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THE SOCIOLOGY OF COLONIES

VOLUME II



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# THE SOCIOLOGY OF COLONIES

AN INTRODUCTION TO THE STUDY OF  
RACE CONTACT

by

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VOLUME II

LONDON

ROUTLEDGE & KEGAN PAUL LIMITED

BROADWAY HOUSE : 68-74 CARTER LANE, E.C.4

*First published in England 1949*

THIS BOOK IS PRODUCED IN COMPLETE  
CONFORMITY WITH THE AUTHORISED  
ECONOMY STANDARDS

Printed in Great Britain by Butler & Tanner Ltd., Frome and London

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PART III  
THE PROGRESS OF LAW

Le Progrès de Droit

*First published in Paris 1942*

## PREFACE

Ten years later ! . . . The first part of this book was published in 1932. To-day the third part completes the circle. The conflict of manners and customs, the Progress of Law in the colonies . . . this is the *social phenomenon* of the relationship between one people and another in a distant country. I have circled slowly round this phenomenon, rising spirally as a man does in scaling a summit. The method of progression which links one part to the next will appear thus : First we sweep the horizon from a distance and gain as it were a vision in isometric perspective : that is Part I. Next we study the mental and spiritual reactions of the human beings who are the actors in the colonial drama : their ideas, their hopes, their dreams, their hatreds. Without this we could not understand their behaviour. This is Part II. Finally, we examine their gestures and actions : their decisions, their solutions of the problem raised by the contact of two societies in the colonies ; that is Part III. The three parts grow in size with the greater scope of their subject-matter : it is a harmony of Pan's pipe.

In conclusion and as result, I think, I am in a position to formulate the rules and aims of a *Positive Colonial Policy* on the lines of Auguste Comte, founded on *experience and comparison*, using the Present as a guide in forecasting the Future. Hence, a policy which sociology should inspire and animate to discipline (in accordance with the *Method*) the Legislator's inborn tendency to arbitrary despotism. Is this a plan for to-morrow ? Let us wait, which in Provençal means : let us *hope* !

FONTVIEILLE-EN-PROVENCE,

1941.

EDITOR'S NOTE.—The English Edition of Professor Maunier's *Sociologie Coloniale* has combined his Three volumes into Two volumes in Three Parts.

E.O.L.





# INTRODUCTION

## CHAPTER XXXIX

### ASPECTS OF COLONIAL CONTACT

I propose to examine in general terms the social relationships which arise in the colonies between the colonisers and the natives, or to phrase it better, between rulers and ruled.

Since every expansion overseas is in fact a phenomenon of emigration, since there is, as people used to say, a *transference of population* (*transport de peuple*)—to quote the *Encyclopædia* of Diderot and d'Alembert—to a distant country, there inevitably arise social relationships between the newcomers and the original inhabitants. It would be possible to conceive, in theory at any rate, and especially in fiction, the *juxtaposition* of the two populations, without any relationships or contact with each other; it would be possible to imagine the two sets of people living under the same sky and remaining entirely separate without intercourse of any kind.

Contact nevertheless always takes place, even in cases where efforts are sometimes made to prevent it, as in South Africa. The exchange of ideas, the *infusion* of manners and customs, is now an old story, working, as we shall see, in both directions, from rulers to ruled, from ruled to rulers. More recently it has been the fashion in France to talk of assimilation, of frenchification, by which is meant the profound effect which arises, or is intentionally and deliberately produced, by the action of the authorities in overseas countries: the mutual impregnation of the two societies, their acculturation, their adoption, or—as the Americans would say—their amalgamation. “Osmosis”,<sup>1</sup> this has been called: not a happy word.

A hundred years ago the Spaniards used to talk of *afrancesados*, namely, people who had become frenchified, those who had spontaneously adapted themselves, more or less, to their French conquerors; those on whom the conquerors of Napoleon's day had left their mark. They are also called “the adapted” and

<sup>1</sup> [The Shorter Oxford Dictionary defines *osmosis* as “the tendency of fluids separated by porous septa to pass through these and mix with each other.” EOL]

it is becoming increasingly usual to call them "the evolved", those who have been transformed or, it may be . . . deformed!

Since the days of Friedrich Ratzel, the founder of geography in Germany,<sup>1</sup> the Germans talk of cross-penetration or inter-penetration (*Durchdringung*): inter-impregnation—if we may venture on the word—diffusion in both directions, from above downwards, from below upwards, which occurs between two societies juxtaposed in fact, but the one in law superposed. The English call it "culture spread",<sup>2</sup> which we might perhaps render as cultural contagion. Haddon in particular was one of the first to devote attention to social contact in the colonies. The Ancients had already observed it and given it a name. When the Greeks and Romans spoke of "religious syncretism" they were exactly describing one of its aspects—and to the ancient mind the most important, the religious, aspect—the great phenomenon of mental relationships between different peoples, especially in overseas countries.

They had felt and they had noted—Herodotus particularly—that in the colonies societies arise formed of different groups, the old, the new, the more-or-less blended. They already suspected that in certain countries the strata and castes of inhabitants were in reality different peoples, or to be more exact, different immigrations, who had established working relationships with one another: harmonious relationships, according to time and place. We never find social groups existing in complete and perfect isolation.

This present examination of the colonial phenomenon, which may be called—as I have, perhaps unwisely, called it—the "Sociology of Colonies", belongs entirely to this last phase; it is one of the aspects of the external relationships between human groups, the relationship of one society to another, whether in conflict or in harmony. Human groups, especially nations, considered in their external relations, are sometimes *near* and sometimes *distant*.

They are *near* if they have common frontiers and if there is, as we see to-day, a perpetual interchange between them of ideas, persons and things. The European problem is the problem of the relationship between near neighbours, who live in the same place and in the same environment, who share the same climate and the same soil and are situate in the same continent.

<sup>1</sup> [Perhaps, rather, the founder of the tendentious pseudo-science of German Geo-politics. EOL]

<sup>2</sup> [Do we? EOL]

On the other hand, especially during the last three centuries, the rise of great colonial empires has woven a new fabric of relationships developing more and more between *distant* groups, separated by the sea, for colonies and their mother-countries are almost always separated by sea. Colonies are almost always overseas territories, and the sea preserves the distance between the colonies and their mother-countries.

Let us state at greater length in general terms the notion of contact in a colonial country ; let us sketch in bold outline the methods of contact and thus classify the relations between colonial groups.

Colonies are societies composed of *distant*, *diverse*, conjoint groups which thus possess at one and the same time both duality and unity. They possess duality since there are two neighbouring groups in one country, each of which has its own condition and position. Nevertheless, they possess unity since these groups are governed in common by one law and placed under one power.

This contiguity has its infinitely diverse aspects and results. We must distinguish the *agents* of contact, the *phases* of contact—which are also the *degrees* of contact—and then also the *means* of contact and finally the *methods* of contact.

We must first speak of the *agents* of contact who are also the subjects of contact. Though the contact between the peoples is of course in itself a *collective* contact, of one group with another—very often a contact of nation with tribe—yet there is also *personal* contact between individuals.

At the beginning of things it is isolated individuals, the vanguard of *francs-tireurs* and pioneers, who first get into touch with the new peoples. They make their personal contacts, but in the background there is always the collective contact ; for these forerunners, these pioneers, these “bush-rangers” (*coureurs de bois*) as they were called in French Canada, have behind them a social group whose representatives they are. Even if they are exiles, fugitives, convicts, or at best reprobated criminals, even if they are usually guilty of breaking their ticket of leave, that is to say, even if they are buccaneers, they carry with them the habits of their native country.

Personal contact is therefore never perfectly and absolutely individual contact. Though it is made by an individual, pioneer, bushranger, convict or warrior, as the case may be, this individual for his part gets into touch, in the heart of the new country, with some group, town, tribe or federation ; sometimes with a State or

more exactly a Pseudo-State. On one side, therefore, the contact is collective, and this explorer or adventurer has behind and above him the national collectivity of which he is the envoy, though it were in his own despite : even if he wants to follow a lone trail and cut himself off from his fellows, even if he has quitted his native country in search of what he thought was liberty, he remains—whether he knows it or not—steeped in the spirit of his country. The Frenchman remains a Frenchman, at least for a very long time ; he carries French “culture” with him ; he is an agent of French “influence”. He transplants into the distant land some seed, however minute, of French thought and French taste.

Nevertheless, it is desirable to separate in more than one direction personal contact from collective contact. For we cannot often find in overseas countries common contact in the full sense, which is collective on both sides. Sometimes, at the beginning, especially in war, entire groups or collectivities come into contact, for battle is almost, though not quite, always collective. Armies or armed forces clash with each other. Warlike contact, which is often the first meeting of foreign peoples with each other, is by definition collective.

Peaceful contact, however, is much more often personal or individual ; sometimes completely, sometimes partly so. Completely : when it takes place between two isolated individuals, like Robinson Crusoe and Friday. Partly : when it takes place between one individual and a group, one isolated person meeting a tribe or troop, a collectivity of some sort more or less organised and controlled. This gives individual contact on one side only, not the contact of one unity with another. The perfect example of personal, individual contact—more frequent as time goes on—is *conjugal contact*. This is the private relationship of two mates, whether joined in regular or irregular matrimony ; a mixed marriage of permanent attachment, both in the social and the racial sense. This is the perfect total contact, which in the early days of colonial empires was often forbidden—though in vain—by the law-givers. This was so in France and is now so in Ethiopia, according to a recent decree.

This was a *private* contact, often a *secret* contact since it was forbidden or frowned upon. This type of contact was effected by various agents of whom we ought to give concrete examples, if it were possible—as it is not. These were the *pioneers*. The word suits them, for it is derived from an old term of military

architecture. The pioneers hollowed out secret subterranean passages ; they were the sappers who were the first to force an entrance into the beleaguered fort. The dare-devils who dash off to distant lands to spend health and strength and goods, these are the pioneers of the first type of personal contact, but this is not usually warlike contact.

Warlike contact is contact of a kind ; the mere fact of fighting involves a social relationship. A social bond arises between conqueror and conquered—so to call them. An American ethnologist, MacGee, spoke in this connection of civilisation by piracy, of “piratical acculturation”. This holds good for every armed conflict ; it slays, but it binds. It dissociates and at the same time associates. The two parties exchange blows, but also ideas ; they adopt manners as they adopt weapons ; warlike contact is a social contact. The effect of fighting is an interchange of influences. In both camps the fighters are contaminated and transformed in both directions, even without their knowing it. Sailors and soldiers are thus pioneers in forging human links.

After them, and almost at the same time, come the traders, all those merchants who in olden times were bush-rangers plunging into the forests, as nowadays into the bush, to barter with the people of the country. They follow the armies, often even precede them, and in their fearlessness they also are agents of contact. They exchange goods, but also ideas : “fire-water” they give for beaver skins ; but the same hands carry medicines and amulets, images of the gods and portraits of kings ; books of devotion . . . and of revolution. The merchant is a missionary, always without suspecting it.

Later there came, sometimes shortly afterwards, sometimes long afterwards, other agents to form relationships with the overseas countries. First the *colonists* who in the days of the French kings were rightly called “*habitants*” ; let us call them the exploiters, who establish themselves in the “new country” to cultivate it and who therefore necessarily live in close contact with the “natives” or the “indigenes”.

Then came the preachers, in the widest application of the word : missionaries and proselyters, later professors and teachers, distinguished agents of a double spiritual influence, working always in both directions.

Later still come the employers and workmen, the *schoolboys and students*. In this matter of individual contact I am thinking

chiefly of schoolboys and students, recruited from the ruled, who in the course of time will come over to France to learn French lessons and to carry back to their own country something—however little—of the spirit of France. They thus become a second line of pioneers, penetrating and impregnating the subject people with the ideas, the tastes and the manners of the rulers. In the colonial empires, not only the French, but also the English, the Dutch, the Japanese and even in Cuba, it is the students who have invented dogmas and founded parties, just as students do in France, and according to French ideas and tastes. It is the students who have sought to give their countries the White Man's doctrines and to secure for them the benefits—and the reverse—of Western "democracy".

This individual contact is not always nowadays direct contact. Though the relationship is most often straight and direct between rulers and ruled, without the intermediary of another people or another group, though it is often a case of master and subject living side by side and mutually influencing each other, yet it sometimes happens, more particularly nowadays, that the contact is indirect, that an intermediate group interposes, as it were an interpreter, between the two parties who are going to blend into one single society. There may be a kind of interpreting to convey influences in both directions at once receiving and transmitting such influences. The Chinese act as such intermediaries in French Indo-China, the Syrians and the Greeks in French Africa; the Japanese or Portuguese in lands more distant still. Such an intermediate group, while receiving and transmitting, blunts or distorts, misrepresents or over-emphasises, the influences it conveys.

These types of contact in overseas countries must be considered not only from the point of view of the agents who form them, but also of the *phases* or degrees. For the moment of contact may change completely. Relationships may be formed between groups or individuals sometimes before there exists a permanent, regular, established society, sometimes after, especially after. Let us distinguish, first, what I shall call the *pre-contact*, and secondly the *post-contact*. The relationship established between one individual and another, before any assured, guaranteed social order with continuity and regularity is established between the two peoples settled in the country, is only a *pre-contact*. Such, for instance, was the relationship between Robinson Crusoe and Friday. They were the first two; they were pioneers, or

initiators in the social sense. They discovered each other, and formed a bond linking their two selves, before any regular link was formed between their two nations, before they shared any common legal power.

Then there is the *post-contact*, the regulated relation between two persons when a collective order has already been formed, and a society has been founded, where law and administration regulate the relationship between groups, and where in consequence "private persons" come into touch with each other according to recognised customs and laws. They are no longer creators of law. If Robinson Crusoe and Friday were to turn up in a French colony nowadays, their relationship to each other would be regulated without their option or their knowledge, by a pre-ordained statute, and they would fall . . . under the jurisdiction of a tribunal with the widest possible powers. However far they might be from the source of authority, they could not "ignore the law". In their unexpected meeting it would not rest with them to adopt an unrecognised procedure.

Passing on from these phases of pre- and post-contact, let us consider organised, regimented, administered and "directed" contacts, and discuss their *degree*, their range and their depth. In this connection, people do not sufficiently distinguish between relations which on the one hand are accidental, intermittent, occasional and irregular, which occur once and only once, and lead to nothing, and those which on the other hand are regular, permanent, established, which have lasted and developed with time, and which therefore lay the foundation of a social body between those entering into them.

We have two degrees therefore, or rather two scales of degree—for there is an infinity of shades between one end of the scale and the other : intermittent relations, irregular contacts, possibly not desired, in any case not foreseen nor sought after ; and regular relations, established contacts, which are sought for, provoked, established, and which are therefore administered and regimented. The former are *de facto* relations, the latter *de jure*.

If we were to differentiate, as the Americans have done, all the states and phases of social relationship in the colonies, we should need a large vocabulary ! First comes *infiltration*. This is the only relationship which can occur only once, the isolated encounter between a white man and a black, with no future to it, and which yet exercises an influence which suffices unwittingly to change them both, and to make each adopt, the one from the



other, certain fashions which they exchange in a single glance without having spoken to each other. In its effects such an encounter is a social phenomenon.

A more important phase is, secondly, *penetration*, which is a connection, not lasting nor prolonged, but for a short time only, a few days, a few months, at most a few years. It yields a closer contact, whose effects are stronger owing to the passage of time, short though it be. Penetration may be the work of soldiers who, if they have not conquered without striking a blow, may have to remain for months or years, may have to camp, may have to build, during the time necessary to "pacify" and to appease, and will leave their trace behind, both of what they gave and of what they took. Penetration may also be the work of traders, colonists and employers, all these permanent exploiters who are "habitants" and who in order to secure as much profit as possible from their exile, maintain until their death recurrent and repeated relations with the native inhabitants. Even if it is not desired, even if persistent efforts are made to prevent it—as were made by the French and other peoples elsewhere—penetration is the result of living in the country; and in course of time the reciprocal influence of the two established groups on each other is profound.

Finally, there is *association*, for prolonged living together which, as with the French in their "old colonies", well so-named, has lasted for centuries and centuries, produces in time, whether desired or not, a community of interests, if not identity of feeling. Common interests suffice to cement a social bond, common advantage leads to the elaboration of a common law between the two groups. When people are thus associated they progress in time towards greater humanity, more equality, less separation and less domination. For, as the Greeks were well aware, full association can exist only between equals, and this association, though confined at first to matters of common advantage only, leads sooner or later to familiarity and community. Self-interest often influences feeling; in certain special cases a common spirit is shared by two separate spirits.

Let us now leave aside the agents, the subjects, the phases, the degrees, and direct our attention to the *methods* or the procedures of human contact, and ask ourselves not "who with whom?" and "up to that point?" but "how?" "whereby?" and "wherewith?"

The *methods* of contact are the procedures the French employ

in their capacity as rulers to engineer, or if necessary impose social relationships. There are four main methods : spontaneous contact, engineered contact, imposed contact, forbidden contact.<sup>1</sup>

*Spontaneous contact.* As the words imply, this is free and voluntary contact like Robinson Crusoe's with Friday. Two join forces, without being obliged or compelled to do so ; they form a bond between them of their own free will. In our day these spontaneous relationships flourish best between individuals. As soon as self-interest prompts or fosters them, such relations grow up between ruler and ruled without any intervention by the authorities. When we see in North Africa, or Indo-China, or the Philippines, mixed trade unions where the names of black and white stand side by side, in many cases freely, with no thought of colour . . . this indicates that the coloured man has understood without constraint being exercised, that it was to his advantage to penetrate into the heart of groups already constituted by the white workers. If development contracts have been privately entered into between people of the Maghrib and Europeans, if pasturage and agriculture, notably by means of the *complant*, are the common work of both parties, this is the result of self-interest rightly understood.

*Engineered contact* is promoted by the advice, not by the pressure of the dominant group, whose intervention is thus confined to proposal and suggestion. By lecturing, by teaching or by propaganda, the nations are convinced that it is in their own interest to get into touch with the newcomers : contact is suggested but not insisted on. You preach to the people, you indoctrinate them, in a social sense you convert them, without compelling them by law to accept a change which they did not invite.

We meet the *imposed* contact when the natives are forced, either in practice or by law, to enter into relationship with the rulers : when the law imposes on them obligations towards the immigrants. A colony is always recognisable by the fact that there is a greater or less degree of domination ; that the legislator imposes explicit and defined actions and deeds : such as, for instance, the compulsory education of children in Algeria. The decision of the authorities here imposes obligatory prescribed contact ; or it imposes compulsory military training in the barracks, or the compulsory payment of taxes, or an annual

<sup>1</sup> [Forbidden contact as " a method of imposing social relationships " is a refreshing if unintentional Irish bull. EOL]

visit to the tax-collector. All these things are social contacts imposed by the decree of the French power.

Contact may, on the other hand, be *forbidden* or prevented when in certain places and at certain times it has seemed desirable not to encourage contact, but more or less absolutely to forbid it by separating the two communities and placing difficulties in the way of their getting to know each other. The Greek and Roman colonies had laws providing for absolute separation of domicile between colonists and natives. The Greeks called this ordinance *xenelasia*, whether it applied to neighbouring unconquered foreigners, to conquered foreigners, or to the natives of overseas territories. In the South Africa of to-day there is a régime whose aim is to separate as far as possible the natives from the Whites.<sup>1</sup> This policy is crudely called *segregation* and involves herding the natives together into extensive "reserves". This is the policy the United States adopted towards their Red Indians in the hope of thus preventing their utter disappearance. In the same way we nowadays establish game reserves for the wild animals whom we hope to save from extermination by the hunters!

Though people do not now perhaps go so far—especially not the French—as to wish complete segregation, we must remember that at the beginning of the French war in Algeria the policy was discussed of "driving back" the natives towards the South. This policy was proposed, but not practised, by the French in Algeria. Even to-day, there are various restrictions which do not absolutely forbid social intercourse between the two populations, but which at least considerably hamper them. There is, for instance, prohibition or limitation, according to the circumstances, of the emigration of the natives of these countries to France. An Algerian, a Tunisian, a Moroccan, an Annamite or a native of Tong-King, may not freely visit France. In the other direction, there is prohibition or limitation of the immigration of Whites into the French colonies. The immigration of Whites into Australia is practically forbidden or severely restricted<sup>2</sup>; in other places it is hampered, rationed or screened by the government. Directly or indirectly then, contact between Europeans and natives is limited.

There are, especially in the legal sense, two aspects of this

<sup>1</sup> [In this connection, see Edgar H. Brookes: *The Colour Problems of South Africa*, 1934. EOL]

<sup>2</sup> [Circumstances have changed not a little since 1942. EOL]

human contact ; it may be *hierarchic* or it may be *equalitarian*. We meet hierarchic contact under a system of domination, and equal contact under a system of partnership.

In the beginning, where there is domination, the one society is rigorously superposed on the other : masters on subjects. All contact between them is therefore between superiors and inferiors, rulers and ruled, the great and the small. This recalls the manuals of etiquette in the olden days of royalty, where the rules were laid down for the correct behaviour of the inferior to the superior : the respect, the courtesy, the taboo ; there was a relationship between the social classes, but a relationship *sui generis*.

Nowadays, in France and in the French Empire, we find a new social scheme emerging and gradually taking shape. This is social contact between equals—*equalitarian* contact—arising from the partnership established between the two populations. Where there is partnership there is bound to be some degree or other of equality ; between neighbouring peoples there will be even more, there will be familiarity and community, sometimes even intimacy and friendship. There will arise equal or familiar contact, family contact, or what we might call kindred contact, for in certain cases, after intimacy has been established, adjacent peoples have in fact become kindred peoples, and bonds similar at least to those of true kinship have been formed between them. The colony is then ideally one family.

## CHAPTER XL

### BEGINNINGS OF COLONIAL CONTACT

The first point it is our business to examine is the beginning of contact. How did the first contacts take place?—after what fashion and with what results?

Let us see what we can find in the narratives of the very first explorers, both those of olden time and those of our own day. For even to-day you may *discover* in the depths of some forest, peoples who have till now been overlooked. It is not more than thirty years<sup>1</sup> since people got for the first time into touch with the Pygmies (to use the name the Ancients used) deep in the forests of the Equator, the *Ni* as they are called in the French and Belgian Congo. There is no question of taking an accurate *census* of them. It is not yet thirty years since expeditions of "observers" sent out by the American University of Berkeley really reached for the first time some unknown peoples in the Philippine island of Luzon. Still more recently, not yet twenty years ago, unknown peoples in New Guinea and Borneo have had their first contact with the explorer.

The universal result of a first contact is misunderstanding: each side always mistaking the other.

To the native, the European seemed a spirit or mayhap a demon; they did not dream that the new arrivals might be men like themselves. To the European, the native was represented or, better, imagined, not as he was, but quite differently; he was thought to be either very wicked or very good. Sometimes he was a mere animal, a "brute-beast" as the phrase was. At other times exactly the opposite. Not *following* Rousseau, but a good two centuries *before* Rousseau, the aborigines were believed to be perfect, virtuous and happy beings, who were good where we were wicked, and who ought therefore to be an example to us. The idea of the Noble Savage which spread, and after Rousseau held the field, was that of a naked man, living happily, following Nature, behaving according to the law laid down for our first parents. This idea has not been obliterated; it has survived even down to our own day! It has happened that

<sup>1</sup> [Here, and in the following lines, it should be remembered that these words were written in 1942. EOL]

French explorers—Flatters and Morès in the Sahara, for instance, and others amongst the *Moi*—have paid with their lives for this illusion about the happiness and virtue of naked man.

It is a curious fact that, independently of place, time and circumstance, the spirit of the relations with the very same people may change completely, sometimes in an instant. Sometimes the natives have offered the new-comer conquerors an ugly, sometimes a kindly welcome, sometimes both at once from different groups or individuals. Sometimes a hostile has succeeded to a friendly welcome ; sometimes a friendly welcome to a hostile one. There is uncertainty and instability in all these first-minute contacts.

The initial hostile welcome is frequent, but less frequent than is commonly assumed ; it would seem to be—not that I have attempted to compile statistics—less frequent than the friendly welcome. A kindly reception is the more usual, at least at the very start.

The hostile welcome is in a hundred per cent. of cases first demonstrated by savages by a general flight, inspired by the fear that seizes them at sight of the strange arrivals. This was so with the Australians. It is most fully displayed, however, in fighting and armed opposition, whether this opposition is instinctive or deliberate.

It is shown also by guile, which the early navigators stigmatised as perfidy and deceit. This was often the case amongst the peoples of the Pacific. They offered a cordial welcome with open arms—the arms of both sexes, I mean—the bronze siens of whom Bougainville spoke swam out to meet the sailors. Shortly afterwards, murder followed, or at best the thieving of which the early explorers in Oceania complain so bitterly. Scarcely had they been welcomed, scarcely fallen asleep, till they were robbed. The Netherlander Antony Schouten vigorously complains in 1658 of repeated thefts by the Sumatrans. This shows misunderstanding. Amongst the natives, if you are friends you lend things to each other, you give things to each other. The Sumatrans had not, it is true, read our theologians, who say that between friends all goods should be shared in common, but they were wont to practise a customary "communism". When you have got so far as to exchange gifts, even to exchange blood, you are free to take unquestioningly from each other anything you think you want. So the wails of the earliest explorers' writings bear witness to the grave misunderstandings which

from the first rudely confront all peoples making new contacts. Certain of these countries were christened by their discoverers with strange names, expressive of their own disillusionment : a hostile welcome following on a friendly one, or to be perhaps more accurate, a friendly welcome masking a hostile one, which was not long in manifesting itself acutely. So we have the Bad Boys' coast, nowadays the Ivory Coast ; the Isles of Thieves, known now as the Marianna Islands. These names perpetuate vexatious memories.

The hostile welcome had its reasons, two in particular : fear and the taboo.

The religious *taboo* arose in the natives' mind from their surprise at seeing White Men for the first time. It was the colour of their skin more than anything else which took the natives by surprise.

By what one might almost call a providential coincidence it frequently happened that their traditions told of white spirits and white gods of early days. When the White Men came or when, as the natives expressed it, they "returned", they were spirits or they were gods. Sometimes they were good spirits or good gods, often they were bad spirits or bad gods : evil demons, like the ancestors who had been stinted of the rites to which they were entitled and who came to avenge themselves on the living against whom they harboured a grudge : spirits or gods therefore against whom the living must protect themselves.

This taboo, to give it its Pacific name, might well be the reason for flight or guile ; it could not be the reason for battle. You do not fight against ghosts. In dealing with less "superstitious" populations, we must assume another reason, *fear* or surprise in themselves ; fear without the taboo, secular non-religious fear we might perhaps call it, which sufficed to scatter the natives and impel them to oppose the arrival of the immigrants.

Fear is the mother of gods, and here it came more especially from the fact that all these Whites possessed firearms. The Whites had noticed that it was a good plan to fire some shots on disembarking. This gave a display of strength and scattered the natives who had rushed to the water's edge to inspect these white spirits coming from afar, from the other world, from Hell perhaps. The fact that the newcomers had cannon and guns may perhaps have sometimes won them a friendly reception, but it seems to me as I read the narratives that it more often

provoked a very hostile one. For in the Southern Seas, as indeed with us at home, fear is an evil counsellor where men are gathered together.

Taboo and fear sometimes gave way to *contempt*. This did not usually occur amongst primitive peoples, the backward or retarded folk who developed rather a great though fear-laden respect for the White Man. Respect may often take the form of fleeing before the god whose brilliance may not be endured. But contempt arose amongst proud developed peoples, and the Whites had no means of protecting themselves from this contempt, for they were ignorant of the beliefs or superstitions of these strange peoples. In olden days the inhabitants of Hindustan felt a great disgust for the first people who travelled across the continent, for these were mostly officers and they wore leather belts of ox- or cow-hide and the Hindus have a horror of this animal.<sup>1</sup> One of the reasons for the Sepoy Mutiny of 1857 and the earlier Mahratta revolt of 1808 was the soldiers' being compelled—in ignorance of their prejudices and taboos—to wear leather belts and grease them with beef fat.<sup>2</sup> So ignorance and misunderstanding—inevitable where strange minds meet—have been the cause of many a tragedy!

In other cases, a hostile reception formed the second act, following on a first act of friendly welcome. It was our own doing—let us not say our own "fault", for we could not in those early days understand the ideas and desires of the inhabitants whom we often shocked profoundly—it was our own doing when the friendly welcome soon changed to a hostile one. In Juida in French West Africa two explorers were massacred the other day for killing two snakes. Their first instinctive gesture had been to slay the animals, but these were two sacred serpents: they had committed sacrilege, and were put to death.

On other occasions the conquerors have been at fault and it is the crime of their own harshness and cruelty which has transformed the friendly into the hostile reception! From the earliest days brutality was shown by the conquerors in Africa and the Pacific; the natives, men or women, were frequently carried off by the sailors and the whalers. This occurred in the Marquesas Islands at the beginning of last century where what began as a kindly welcome had a very tragic ending.

<sup>1</sup> [Perhaps, rather, they hold it sacred and have a "horror" only of its use. EOL]

<sup>2</sup> [The English student should inform himself more accurately of the facts of the Indian Mutiny. EOL]



Passing through Tierra del Fuego, Magellan got his men treacherously to kidnap some Patagonians. The victims were overwhelmed with gifts, amongst which were some large iron rings. When they had decked themselves out with these, the rings were snapped to, and the prisoners led away. The sailors tried in vain to capture some women too but succeeded in securing only one who died on board. Such episodes marked the European's coming !

Whether the hostile reception is primary, or accidental and secondary, whether hostile from the first or only in the second place, it creates anxieties and duties for the new arrivals. It compels them to take precautions and often to avoid entering as conquerors with flags flying and drums beating. Instead, they must insinuate themselves stealthily, keeping one eye always open for an enemy ready to attack. In Islamic countries, whether among Whites or Blacks, the first explorers, almost up to the present day, are driven to assume disguise so as to penetrate unrecognised amongst these populations who would promptly slay an Unbeliever rash enough to seek a footing amongst the Faithful. Such precautions often failed, the ruse was discovered and the traveller molested. This happened to René Caillié, for instance, who reached Timbuctoo in disguise in 1826 ; and fifty years ago in Morocco to Father de Foucauld, to the Marquis of Segonzac and after them to Auguste Mouliéras, all of whom were obliged to disguise themselves in order to explore Moroccan territory. Segonzac was posing as a Musulman ; it was therefore up to him to observe all the prescribed rites of the country, and not for one moment to fail to perform the appropriate and solemn gesture. He knew how he was detected. He forgot himself for an instant and made water standing, whereas a True Believer urinates crouching and slowly.

For more than a hundred years, travellers have succeeded in crossing Arabia and even in visiting Mecca,<sup>1</sup> but always in disguise. The traveller Burckhardt travelled through the Hijaz disguised as a *hajjî*, that is a pilgrim. A great Dutch Arabist C. Snouck Hurgronje successfully reached Mecca in 1881, but as a wearer of Arab dress and diligently telling his beads. By a great feat which has so far not been rivalled, he lived there

<sup>1</sup> [English readers will remember that Richard Burton performed the Pilgrimage to Mecca and Medina in 1853 (see his account of his adventures published in 1855) and will be familiar with Doughty's great classic, *Wanderings in Arabia Deserta*, as well as the work of more recent British travellers, St. John Philby, Bertram Thomas, Freya Stark and others. EOL]

six months. The fanaticism of Islam represents the peak of hostile reception.

Let us turn to the friendly welcome. The natives have fairly often greeted the strange arrivals as spirits of good augury bringing blessing. They opened their arms to the strangers, they took them home, they fed them and introduced them into their private life, not only by presents and gifts, but by blood-exchange—this old procedure of blood-brotherhood familiar to the Ancients—or even by perhaps more secret rituals, by prostitution, or what we might call sexual hospitality, which was, to the natives, but a method of . . . expressing welcome ! It is not half a century since the Kabyles of Algeria were wont to offer as a rite of communion this form of hospitality to the traveller, and the stranger who refused to accept it gave grave offence to his generous host ! (I myself came too late on the scene to come across this old-time custom, now abolished.)

How and why the kindly welcome ? Sometimes it was offered from the very start, sometimes only in the second place. Sometimes it was offered from the very beginning and maintained, if the newcomers had the wit not to irritate the well-disposed natives, nor yet to respond too gushingly to their advances. Sometimes it supervened only after initial hostility. When Jacques Cartier, the discoverer of Canada, arrived on the shores of the Gaspé Peninsula where he planted the wooden cross that is now replaced by a cross of stone, he found the tribe of the Mic Mac. The Mic Mac at first fled, hurling their javelins at Cartier's companions. They presently returned, reassured on finding that three of them who had remained because they were ill of a fever, had been cured by the stranger. The explorer was a healer, he was bringing blessing. Later he himself and some of his companions were cured by a herb known to the savages : such an exchange of benefits constitutes a real communion.

In black countries where the native is calculating and self-interested, explorers were favourably received. The great Black Kingdoms of Benin and Juida, whose sovereigns were merchants and lived from taxes known as "customs" which they levied on all travellers, were inclined to favour European penetration. The same inclination is found as far off as Oceania. If some islands were the "Isles of Thieves", there were also the "Friendly Islands", known to-day as the Tonga Islands. Magellan himself observed that the King of Tidore in the Moluccas

seemed more than eager, all too eager in fact, to welcome himself and his companions. This Muslim King overwhelmed them, so the narrative says, with embraces and vows, mainly because they were bringing a very large number of gifts ; but also because the King had dreamt a short time before that birds were going to come, great birds covered with little pale-skinned men, born no doubt in the moon. These were spirits, and good spirits too, who must be benevolently welcomed. If they were hailed with enthusiasm that was because they were gods or spirits, good gods or good spirits. The natives had seen the signs that foretold them. This is the state of mind which Rudyard Kipling portrays in his romance, *The Maltese Cat*.

Prophetic visions and signs which impressed the simple minds of the natives made the Europeans appear as spirits or re-incarnations of ancestors, the long-since dead returning now to bring blessing to their posterity. The newcomers were kinsmen and friends, spirits returning to bless the people. In Tahiti, for instance, the prophet Moui had predicted that boats without an outrigger—for the local dug-out canoes were all equipped with outriggers—would some day come, despite the doubts expressed by the chiefs who heard him. When Wallis and Cook arrived, their ships were taken for floating islands, peopled by supernatural spirits. When the natives went on board and saw the ship's structure, they noticed the dinghies and immediately cried out that Moui's prophecy was fulfilled, for they had no outriggers. So this was Moui's ship, and the crew who manned her were good spirits whom the natives therefore treated well . . . too well !

Half a century later, also at Tahiti, Dumont d'Urville recorded a current legend : At the beginning of Time when the Ocean covered the whole World, a large bird alighted on the waves. She laid an egg which was the island of Tahiti. Then a couple came, bringing with them a dog, a pig and a pair of fowls, to people the Hawaiian islands. This couple gave birth to a jealous god, an evil god, Rono, who slew his wife and went away promising to return one day on a moving island on which there would be found coconut palms, pigs and dogs. Cook's ship was the promised island bearing coconut palms, pigs and dogs ; the masts were the palms. Cook was dumbfounded when he landed at Tahiti, to be greeted with prostrations and most insistent sacrifices. There could be no doubt : he himself was Rono ! He soon discovered, as he tells us, how inconvenient it is to be a

god or a spirit. A priest compelled him to swallow ill-cooked pork ; when he refused, the priest chewed up the pieces for him and offered them again ; being a god he had to accept them.

Cook, however, was not the only re-incarnate god. Towards the end of the century before last, one of these adventurers whom France produced, a certain Loustano made a fortune in the service of various Indian rajahs, and ultimately became Commander in Chief of the Mahratta army. He became deified through a prophecy of the god Shiva. He happened to have lost a hand in battle, and had had a silver hand made for himself. Now the god Shiva had announced that one day a spirit would re-appear wearing a silver hand. This was of course as usual a misunderstanding, but a benevolent and beneficent one, which Loustano the god profited by. A hundred years ago the White men in Australia were taken to be spirits of the dead, recognised by name. Such and such a white man was the spirit of such and such a definite ancestor who was coming back to visit his descendants. So it came about that a certain convict, Will Butler by name, had a curious adventure. He had escaped from some prison or other in 1803. He took possession of a broken arrow that he found lying on a dead man's grave, probably thinking of it merely as a curio. The local savages identified him by name with the deceased. He lived some thirty years or so with the tribe, was married, and was chosen Chief in virtue of being a reincarnate spirit, and was worshipped as a deified king until his death.

These are by no means facts only of ancient history ! In 1861 in French Guinea a missionary was recognised, in his own despite, as the deceased brother of one of the natives, and he had the greatest difficulty in extricating himself from the all-too-affectionate embrace of his "brother" ! In the island of Fernando Po a dying Chief announced in 1898 that he would return as the "chief captain" of a ship. Shortly afterwards a travelling geologist was hailed, much against his will, as the returning spirit of the dead Chief and was treated with the due respect and adoration.

The Kurnai of South Australia used fifty years ago to believe that when a man died he went away to become white ; all dead people turned white. When a corpse according to native Australian custom was roasted or burnt, it used, they said, to become more or less white, at any rate less black than it had been in life. So when a White man landed, the natives assumed

him to be the spirit of some specific personified fellow tribesman. He was So-and-So's spirit, or So-and-So's, and the relatives immediately gathered round to worship him.

It is quite possible that the same ideas reigned in the highly civilised Near East. From Lamartine's travels we know that an English lady was living amongst the Druses of Mount Lebanon, having quitted England to escape from English "cant". The Druses considered the eccentric Lady Hester Stanhope as insane and inspired, which is of course akin to being divine, for the worship of madmen is common currency in the East. In England Lady Hester would probably have been put in an asylum or a mental home; in the Lebanon she was revered and protected, and for twenty years she was able to travel about the country without the slightest danger, nor was she forgotten after her death. She suffered one inconvenience for her divinity: the Druse women came to believe that the supernatural power emitted by her cast a spell over their menfolk. Wherever she travelled she was thought, however, to bring blessing and fecundity. A childless woman desiring offspring, lest she should be repudiated as barren, would come to touch Lady Hester's garments, and go from her presence with hope renewed.<sup>1</sup>

Such is the friendly, kindly welcome, which is, you might say, superstitious, rooted in religion, preserved by tradition, a welcome which, as we have seen, is fraught with dangers and annoyances. To be a spirit and to pass for a returning ghost may entail most unwelcome familiarity and importunity. In these countries kinship carries with it infinite duties; you are not your own; there is no such thing as an individual in the real sense; you belong to everyone else, you live with everyone else; you may at any moment be approached, you may be embraced; you may be despoiled. Excessive affection, excessive honour, fall to the lot of a god. Men are bound to offer you gifts and prayers, but you are bound to make due return for prayers, and gifts seal a contract with a god. Men invoke the god that he may exalt his children; if he comes back to visit his descendants he must come with blessing. He is bound to give

<sup>1</sup> [Lady Hester Stanhope (1776-1839) was a granddaughter of Chatham and a niece of William Pitt. She was famous as a beauty and a wit and played a notable rôle in English society and political life as Pitt's hostess and confidential secretary. After Pitt's death she left England: in consequence, it is believed, of a tragic love affair. Her subsequent adventures have been recorded by her faithful physician, Dr. Meryon, in six volumes of *Memoirs* (1845-6). Many biographies of this amazingly gifted and eccentric woman have been written; the most recent, by Joan Haslip, has appeared in the Penguin series. EOL]

and to give indefatigably. Everything is taken from him. Cases are recorded where he was stripped naked. If the White Man has gained from being deified, he has suffered too, and he has suffered loss. Being a god is not a wholly profitable trade! The memory the god retains is that his worshippers were . . . thieves; that they took everything and kept it, that they recognised no distinction between *meum* and *tuum*. That is why Jacques Cartier called his Canadians "Hurons" to rhyme in French with *larrons* (robbers).

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## CHAPTER XLI

### PERSONAL CONTACT

To make our definitions more precise, we must spend a little time on one of the means of contact of peoples in the colonies : *personal* or individual contact, in order to note the *types* and the *agents* of such contact.

There are two *types*, according to whether the personal contact is complete or incomplete, perfect or imperfect.

Personal contact is *perfect* when it takes place between two individuals each on his own part acting for himself ; when one unity meets another and the result is to form a pair, a group of two ; a pair of different sexes, especially a conjugal couple, or a pair of the same sex like Robinson Crusoe and Friday.

Such perfect individual contact—constituted by a couple springing from different peoples—took place at the very earliest beginnings. It arose in battle where personal relations were formed. One of the major reasons for the lightning success of Cortes in Mexico was that, in addition to a minute cannon which terrified the Mexicans by its unprecedented noise, he took with him a native mistress, the celebrated Marina, who acted as his guide over the tracks and through the most secret defiles, and thus eased both marching and fighting for him.

There is, however, an *imperfect* type of personal contact which is individual on one side only, where an individual makes contact with a group, one personality with a collectivity, not one individual with one other.

This is the most common phenomenon and a very old one. It arises at the outset of all expansions, and in two cases, that of the *immigrant* from Europe into overseas lands and that of the *emigrant* from such lands coming to Europe. On the one hand, there is the colonist, the adventurer, who goes overseas, is for a long time isolated, and enters into relations with the native tribes. On the other hand, the stranger from those other countries, an adventurer and discoverer also, who comes to Europe and makes contact with our ancient countries, to carry back with him visions and impressions.

The *immigrants*, pioneers adventuring singly into countries overseas to leave there memories—permanent or fleeting—of

their ways, their ideas and their works, have always been, even in ancient times, either *unwilling* exiles or *voluntary* travellers.

In the earliest days of expansion it would seem that most of them were *unwilling* people, exiled oversea and compelled against their will to stay there, and they necessarily lived in isolation in these distant countries, sometimes for a long while, sometimes until their death. They often lost themselves, as we might say, in the bosom of some tribe. Such were the men whose fate has been described for us, from documents he had read, by the great novelist Alain-René Lesage. The Chevalier Beauchêne<sup>1</sup> is an adventurer who was doomed reluctantly to struggle, live, and die, far from his native land.

These unwilling immigrants owed their fate to various causes; sometimes they were deserted by their companions after one of those quarrels which were frequent on shipboard among the rough sailors of early days. Many of them, marooned on what was thought to be an uninhabited coast, discovered that the hinterland was not a desert, but peopled, and if they were not first massacred and perhaps eaten, they perforce accommodated themselves to the life of their hosts. The ranks of unwilling exiles were swollen also by shipwrecked sailors who sometimes lived amongst the local tribes until their death. The victims of shipwreck or desertion, still more the prisoners or captives whom the natives had secured, remained stranded—like the survivors from Medusa's Raft<sup>2</sup>—after the departure or death of their companions. They were often placed in captivity by the people of the country and so they stayed, much against their will, and often for a long time amongst the local tribes and became "barbarised" (*sauvagisés*), as they used to say in French Canada. Even in more advanced countries like Barbary, infested as it was by pirate corsairs, many captives were kept life-long prisoners.<sup>3</sup> We learn from the Memoirs of the Sieur Dumont how hard was the lot of the one-time Christian slaves—of whom he was one—these "renegades" who were till recently still to be found in Morocco.

<sup>1</sup> [The great French dramatist and novelist Le Sage (1668-1747), author of *Turcaret*, one of the best of French comedies (first called *Le diable boiteux*), published a romance, *Vie et aventures de M. de Beauchêne* (1733), a narrative something in the style of Defoe. EOL]

<sup>2</sup> [The Medusa's Raft (*Le radeau de la Méduse*) is the title of Géricault's famous picture of a shipwreck, first exhibited in the Paris salon in 1819, and afterwards with great success in London. It was later acquired by the Louvre. EOL]

<sup>3</sup> Regnard, for instance. He told the story of his captivity in a pamphlet called *La Provençale*.



At the beginning of last century, an English sailor called Mariner was taken prisoner by the Tonga islanders in 1806. He was compelled to enter the King's service, became General, and fought on the King's behalf. After a time he was able to get hold of two cannon and two English gunners to man them. The King of Tonga thus became a powerful sovereign and took possession of the adjacent archipelagos. Mariner frankly confesses that, finding himself so strong, he was seized by a proud desire to make fresh conquests for the Tongan King. If the King had not been more temperate than his General, and had not curbed his ambitions, Mariner might have founded a great Pacific Empire. He was, however, dismissed four years later, in 1810, and left Tonga a somewhat disappointed man.

The lost, the captives, the shipwrecked and the marooned were not the only folk to get into touch with native peoples. There were also the fugitives or refugees who fled their ship not voluntarily—for we are still discussing unwilling exiles—but because they were guilty of some crime. In the same way, though from other motives, the French Revolution saw French *émigrés* like Talleyrand and Volney fly off to the United States, make acquaintance with the savages, live a while among them to leave memories of themselves among the Red Indians. For not all the *émigrés* assembled in Coblenz. These men were also compulsorily fugitive, driven by fear of death.

The same fate overtook the pro-English of Georgia in the New World, for when the English colonies seceded, some of the colonists took the English side. When the Americans won and Independence was proclaimed in 1776, these pro-English were forced to flee and took refuge amongst the tribes. Little by little they disappeared, "decivilised" as we might say, "barbarised" as the phrase then ran.

In quite recent times we have seen in the Maghrib renegade Frenchmen adopting Islam, not under duress but of their own free will. Auvergnat, for instance, became a *marabut*, a sacred personage worshipped by the people, and lived and died in Morocco in the odour of perfect sanctity. Another specimen almost of yesterday is Qaid MacLean, a Scotsman captured by the corsairs, who became agent of the Sultan of Morocco and who fought, for a time successfully, against the pioneers of the French Protectorate. He was later set at liberty and returned to his native Highlands.

So there were unwilling immigrants but there were also, in

increasing numbers, *voluntary* immigrants, moved by the desire to escape from civilisation, a desire which has sometimes in France overtaken the very civilised, the overcivilised. They have been tempted to escape, to free themselves, to recapture the primitive man's simple and natural life.

This is what, since the days of Jack London, the English mean by the "call of the wild", the appeal of the savage, or the primitive. Having set out of their own free will, under no outside pressure, these voluntary exiles are escapists, men who have wanted to seek not comfort but happiness and liberty—or so they thought—who longed to fly convention, regulation and restraint, hoping to find amongst "primitive" people a life without laws.<sup>1</sup>

It is remarkable that literary folk should have fallen victim to such a state of mind, for of all people they are the most intoxicated with the civilisation of the western world. Stendhal has expressed, without dwelling on it, the vanity of the hope that you can recapture in the heart of the desert the "natural life" of primitive man, by exiling yourself from your own country. The poet Rimbaud in many of his poems magnificently voiced the irresistible craving for a life free from conventions, a life such as he dreamed of.<sup>2</sup> D. H. Lawrence, who lived in New Mexico, experimented with it and failed, as he has told us.

These voluntary exiles, now sacred in literature, have been of the most diverse types. First among them were the navigators who come on the scene from the earliest days of colonial expansion in the New American world. Often they were just sailors, sometimes officers who deserted under the conquering spell of virgin countries. One of them was the Chevalier de Saint-Castin who in the days of Louis XIV became a "captain of savages" in Canada. He remained as a great chief amongst the Hurons, living like them and dressing like them, and married, as was fitting, to a Huron woman, but considering himself as in alliance with the French. A simple sailor called Picard joined the Oneida tribe of the Iroquois and was initiated into their secret rites. Many years afterward French officers came across

<sup>1</sup> [One of the most recent of these is R. V. C. Rodney, who writes most enthusiastically in *Wind in the Sahara* (1947) of his life as a Nomad Badawin. EOL]

<sup>2</sup> Jean Arthur Rimbaud (1854-91) wrote all his violent, passionate, decadent poetry before he was nineteen, and *before* he embarked on his amazing and mysterious career as tramp, beggar, vagabond, labourer, quarryman, Dutch soldier, Abyssinian and Ethiopian explorer, trader, native chieftain, merchant prince and political intriguer. [The last word on this errant and neurotic genius has been said by Dr. Enid Starkie in her brilliant and penetrating study. *Arthur Rimbaud* (1947). EOL]

him, but he resisted all their efforts to induce him to return home: he had become a hardened savage, an unrepentant Red Indian !

In the Zulu country an English sailor became a chief, and a very great chief, for at his death he left eighty-two wives. This made the subject of inheritance one of the most difficult and lengthy problems of English law which had to intervene because he had left English heirs as well. Rousseau was the seducer of many young soldiers and sailors, even for instance the young Napoleon who was a great reader of the *Social Contract*, and who appears for a moment to have fallen under the spell of the mythical free-living savage. More often, however, in recent times, the easy victims of these illusions have been refined and cultured men, writers more especially : "intellectuals" and literary folk. In the course of the last hundred years many Frenchmen in Algeria have been converted to Islam, chief amongst them Ismail Urbain, a follower of Saint-Simon, who donned the *burnous* and fraternised with the natives. Joly, a professor at the Algiers *Madrasah*, lived in Arab style, and spoke only Arabic. People who knew him have told me that he had largely forgotten French. To-day there is a professor at Rabat who bears both a French and an Arab name and lives entirely as a Musulman. A justly celebrated case occurred in Japan where the American Lafcadio Hearn, who has written quite delightful books about Japan, "went Japanese" to perfection. He was a Professor at the Imperial University of Tokio, married a Japanese wife, lived exactly like a Japanese and thought and wrote directly in Japanese.

These escapists from our western world have often become kings, or the sons-in-law of kings. The Spaniard Herrero became *Cacique* of Peru and a nabob ruled in India whose name, Madec, points clearly to his Breton origin. Similarly the celebrated Bonneval distinguished himself in Turkey round about 1720 and became a "two-tailed pasha". Then there are all those who in Oceania and Africa have been, as the phrase is, "uncrowned kings", the petty kinglets of a small area holding ephemeral power . . . More effectual as intermediaries for contact in the French colonies have been officers, officials, engineers and the like ; men like Vannier and Chaigneau in Hanoi and Hué, who built citadels in Vauban's style always round reserved cities ; or Soliman Pasha and Linant de Bellefonds in Cairo. Sometimes acting as sovereigns, sometimes as servitors, they took and they gave, and in either case they forged links.

From the reverse point of view, however, there are the *emigrants* from these foreign lands to France, who came to feel and to hand on French influence, bringing with them their traditions, offering France their products, creating in France new needs . . . These emigrants are made up of *captives*, *envoys* and persons *summoned*.

The emigrant *captives* correspond to what we have in the reverse case called the unwilling immigrants ; they are prisoners or deserters brought against their will. From the time expansions began, the conquerors were wont to transplant some "natives" into European countries.<sup>1</sup> As early as 1341 Canary Islanders who were known as Guanches were brought to Portugal to be converted. After his first voyage Christopher Columbus in 1496 exhibited at Court several natives of the Antilles. In 1550, fifty people from the Caribbeans, the Antilles and Guiana were brought to France. Many of them were kept for several years before being allowed to return home. Some fifty years earlier a Brazilian, very celebrated in his day, whose name is recorded as Essomeric, disembarked at Havre in 1505 and went to the French Court where, the chroniclers tell us, he was much admired . . . especially by the ladies.

There are two cases which gave rise to more talk and also to some writing : those of the two Maoris from the Pacific, Aotourou and Omahi who came to visit the misty shores of Europe.

Aotourou was a Tahitian—an Otahitian they called it in those days—whom Bougainville, the explorer of the southern seas, brought back to France with him. He went to Paris and saw Versailles. He made his appearance at Court and was then packed home, laden with seeds and tools to cultivate the soil. His ship called at Mauritius, where he died suddenly, without ever seeing Mount Orohena again. Omahi whom Cook brought home lived in London ; he was converted, became a Protestant, remained a long time and then returned to his own country. On arrival home, however, his former friends received him with determined hostility. He tried in vain to civilise them, showing them the tools and animals he had been given . . . Two sad stories of defeated destiny.<sup>2</sup>

Next, there have been *envoys* deputed by their king to come to

<sup>1</sup> [This has never, as far as I can ascertain, been a British practice. EOL]

<sup>2</sup> [Is there any proof that these young men who accompanied the explorers to Europe were in any sense "captives" or even unwilling travellers? The fact that Captain Cook personally took Omahi back to his own country would seem to belie it in his case. EOL]

Europe and open relations with the great States. In the time of Louis XIV, both France and England received embassies from highly advanced countries like Persia and India, but from more backward countries also. Little kings sent envoys whose strange ways were found surprising and amusing. Madame de Sévigné in her letters has preserved the memory of an embassy from the King of Ardres which was received at the Court of Versailles in 1670. This king was a Negro Chief from the Ivory Coast neighbourhood. He became interested in the trade the French were doing in his country, and deputed an envoy to France whose opinions and impressions have unfortunately been lost in oblivion. Thirty years later in 1699, Sultan Maulai Ismail, the founder and builder of the Sharifian Makhzan,<sup>1</sup> in order to foster good relations between Morocco and France, did not hesitate to bid his ambassador sue for the hand of the Princess of Conti ! This would have cemented a matrimonial alliance between the two sovereigns !<sup>2</sup> Ismail's envoy was surprised when the Sultan's suit was rejected ! Some admirable verses written on the subject have survived.

In 1787, a hundred years later, Prince Kan was sent by his father, the King of Cochin China, to Versailles. Cochin China embraced at that time the whole of the Empire of Annam from Hanoi to Saigon. A treaty of friendship was concluded between the two countries which lasted for some time and was not without results.

Finally, there were those persons *summoned*, people who were wanted, sought after, and who therefore came willingly in answer to an appeal. These "evolved" persons, as they are now called, might better be styled the educated, the adapted, the transformed, the frenchified.

As with the Romans, the first to be sought after were the *entertainers*, the jugglers, singers and dancers . . . worldly folk brought over under contract, were the bearers into Europe of their culture. These are the people whose invasion of Rome was denounced by Juvenal. In his day, they were Syrians and Levantines ; to-day they are more commonly a hundred per

<sup>1</sup> [The Makhzan system of government in Morocco was in fact founded by Ahmad IV, known as "The Victorious" and "The Golden". It was in part based on the preference shown for men of "noble" (sharif) descent, namely, Arabs as opposed to Berbers. It was further developed during his reign of fifty-five years by Maulai Ismail, "the Bloodthirsty" (1672-1727). See *Ency. Brit.*, 14th Ed., s.v. *Morocco*. EOL]

<sup>2</sup> [The Princess of Conti was a daughter of Louis XIV by Louise de Lavallière. The Sultan rivalled Solomon in the number of his wives and concubines and could boast many hundreds of sons and countless daughters born in his harem. EOL]

cent Negro. There are also the *servants* whom the French colonists bring home with them and who often retain their native dress. There are also the *workers* who have for some time past been numerous in France: Tonkinese, Kabyles or Moroccans, industrial workers for the most part, who come into daily contact with the French working man. They therefore join the trade unions, but they exercise an influence of their own on the French worker, and in some suburbs the nasal notes of Arab pornography assail the ear. Lastly there are the *students*; they come to France and stay a long time, sometimes a very long time, up to seven or eight years, and become profoundly and permanently frenchified. I knew an Annamite who was seized with despair when he sighted his native country again after eight years, when from his ship he caught the first glimpse of Cape Saint Jacques on the horizon. It was a shock to him—a shock of which I was witness—to think of resuming home contacts: this is the measure and the *test* of French influence on a native's mind!

So we have two well-defined types, both of which have yielded material for literature.

There is the European immigrant, the "decivilised" as Charles Renel, Director of Education in Madagascar, has called him, the man who in the Moroccan phrase has become Hassanised; who has lost, blended and dissolved himself in the tribe, who has forgotten his own traditions to create a new mentality for himself. Somerset Maugham has painted his portrait for us. He brings on the stage an American from Chicago who is so disgusted with skyscrapers that he has cast anchor in Tahiti. He is softened by the climate, spoiled by ease and idleness, degraded by the companionship of his native wife; clad in a *pareo*, plucking the fruit of a bread-fruit tree, he has turned into a Pacific Islander, until one fine day he has forgotten that he ever was an American.

Then there is the *emigrant*, the overseas native who settles down in Europe and is able, more or less, to forget that he ever was a "savage"; most often it is a man, sometimes a woman. Madame de Duras's novel tells the story of the Negress Ourika, transplanted to the town, separated from her tribe, civilised, urbanised, but genuinely suffering most cruelly from the new contacts. This transition stage is in truth the tragedy of the "advanced" native.

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## EFFECTS OF COLONIAL CONTACT

The effects of the contact between the natives of a colonial country and the conquerors have various *aspects*.

There are at least four principal aspects or effects : *Disappearance, opposition, conservation, transformation*. Let me briefly explain these terms.

In olden times, the effect of contact between conquerors and conquered was the *disappearance* of the original inhabitants ; they were eliminated, exterminated : they vanished, sometimes very speedily.

Their *disappearance* might be brought about in either of two ways : it might be *spontaneous* or it might be *provoked*.

It has occurred spontaneously when, without having intended it, without having desired it, having sometimes even endeavoured to prevent it, the dominant people, by the mere fact of having occupied some overseas country, have caused the disappearance of the natives. The reason is that the social system of the natives is too far removed from that of the people who have come to rule over them. When the natives are too primitive, or too backward, or too retarded, they cannot adapt themselves to the new conditions. They die out from melancholy or despair, a complaint which has won a name for itself in the languages of Oceania. The Tahitians and the people of the Marquesas Islands, and other Pacific peoples too, have coined various words to express in their own language the "home-sickness" for the past which overcomes them and dooms them to die out. Too great a discrepancy between rulers and ruled, too great *strangeness* in the full sense of the word, have caused the elimination of these distant peoples, without anyone's having desired it. The Tasmanians were all dead within fifty years. In other cases the disappearance has not been spontaneous, but deliberately sought, desired, and caused, by the rulers for their own advantage or convenience. By armed force the natives were exterminated wholly or in part. In Spanish times this fate overtook the Caribbeans in the Antilles. Whole tribes of Redskins and Australian aborigines were almost wiped out in America and Australia, reduced either by arms or by the alcohol which the newcomers taught them to crave.



Whole peoples have died out, leaving no survivor. A few Caribbeans survived in the south of Cuba. Sergeant Batista, the present Dictator of the island whom I met, is himself a Caribbean and he seems to be flourishing !

In more recent times, however, extermination has been partial, not total, and has resulted from drink and from the fatal illnesses which the White Man has brought with him to the " new countries ". There has often been, especially in the Oceanic countries, what is called *depopulation*, a decrease, that is to say, often a marked decrease, in the numbers of the native population. This occurred in Tahiti ; and even more gravely in the Marquesas Islands, whose people were less advanced and less adapted to the new kind of life which the French brought with them. They have not absolutely disappeared ; but they are less numerous, infinitely less, than they were before the coming of the French.

A second effect of social contact in the colonies is *opposition*, which is found everywhere and now more than ever before. I mean the repugnance, or even the actual resistance of the natives to the colonists. The old inhabitants despise the new arrivals and often go so far as to resist the White Man's domination. They resist sometimes sullenly or even secretly, sometimes openly, as the case may be. This opposition arises from various motives, but it has two phases or forms of expression : contradiction and protest.

By *contradiction* I mean simple repugance, or perhaps even resistance, but always veiled ; the force of inertia applied against the administration particularly by Muslims or Hindus. Gandhi has formulated the laws of such passive resistance.

*Protest* is a modern phenomenon of our day. In French colonies it is formulated and expressed when the subjects, educated by the French, their heads turned by the French, reach the point of wishing to control their own destiny. They make their speeches in public, they write their newspapers publicly, and in these they claim the " Rights of Man " whose principles the French have for two hundred years been transplanting under many different skies.

A third aspect of the contact of peoples in the colonies is *conservation*, or even stagnation. The tendency sometimes desired by the rulers, sometimes not, to preserve and confirm the natives in their own traditions, to fix and fossilise them therein, has sometimes gone so far as to arrest the natural evolution of native traditions which are plastic, growing things, more alive than

people always realise, and which therefore normally change with the times. It is a question of traditions of oral law, not, as in France, regulations of written law; of spoken, customary law, not, as in France, of edited and codified law. By introducing the codification and systematisation of the natives' legal conceptions, the French have prevented their adaptation, interrupted their evolution, hampered their modification. By French Codes and Laws they have fixed and petrified the state of law as they found it at the first moment of their occupation. The French have consolidated the legal statutes of their subject peoples, and in the course of half a century codified their customs and ways for the convenience and for the use of French magistrates. They edited the legal traditions of the original inhabitants and gave them a written law such as the French themselves enjoyed at home. Without having intended it, or perhaps in certain cases with intention, but much more often without even thinking about or seeking it, they brought native law to a standstill. If things could have remained as they were, and if a dual system could have been maintained in the colonies, one set of laws for the French themselves and another set for their subjects—each people having its own judges and its own laws—there would have arisen no legal conflict between rulers and ruled.

It is, however, not possible in any country to preserve such a state of affairs. It has often been tried, perseveringly tried. People have gone further and been even more ambitious, endeavouring to restore a dead past, to re-establish what had existed before the occupation, but had ceased with the occupation, trying to march backwards instead of forwards. The French attempted this when they found institutions that had almost disappeared which they thought they could adapt for their own convenience; they re-animated and revived them, and extended them to natives who had never heard of them or who had already got rid of them. They did this whenever they found—as they did in Indo-China and in Madagascar—collective institutions which seemed to offer them responsible bodies, groups very much alive, with whom they could conveniently negotiate, and to whom they could delegate minor matters of administration. They not only preserved and maintained such institutions, but they restored older groups in places where these had often long since disappeared, and they applied them to populations which had never till that moment known them. They did this in Tong-King and Annam, restoring the parish or *commune* which had

already disappeared. They did the same thing in Madagascar with the *commune* or collective village which was familiar to the Sakalaves and to the Hovas, but which they extended to the populations in the south of the large island who had probably never known such a thing. Once again, this was done to suit their own convenience. In many places then, this conservation is really *Restoration* or even *Innovation*.

*Transformation* or adaptation is another effect of social contact, which in fact has many very diverse results that we must now distinguish. These results, however, all share one common feature, in that they effect a more or less radical change in the native legal system. The three chief types of adaptation are *abolition*, *reformation*, *innovation*.

In the first place *abolition*, or what I should prefer to call abrogation ; for in many cases it has been a question of putting an end to an old native law, of drawing a blue pencil through the whole or part of some established traditions. This may be effected in various ways.—First of all by *degradation*. By this I mean that the abolition does not take place suddenly and in a moment, by the decision of a law-giver, but that the old native law gradually disappears in the course of time from the mere fact of the native's contact with the White Man. The native loses the taste for his own traditions ; he forgets the laws and customs of his ancestors. By degrees and often without any pressure being applied, he comes to follow French laws. The change emanates from his side ; in time he forsakes his own law. He renounces and abjures it, for it is a religious law. The Laws laid down by the ancestors, the founders of the Tribe were by nature sacred.—It is *abrogated*, in the full sense of the word when the French authorities formally and expressly decree the abolition of the old law, judged to be now contrary to modern taste.

Secondly, there is *reformation*. The very word implies that while the old native tradition is preserved, it is transformed and adapted to meet the new needs created by the presence of the French. The best means of preserving the ancient law, which is old, respected and venerated, is to adapt it to the new requirements, and so to avoid a clash between the old law and the new. If this adaptation were skilfully and tactfully carried out its result would be to forestall any such conflict. There is no conflict where the vital modification is so contrived that the old law is rendered sufficiently elastic to accommodate itself without too much effort to the principles of the new law.

Lastly, there is *innovation*. In this case the aim is neither to abolish an old law which has no longer rhyme nor reason, nor yet to adapt one by modifying it, but to set up in these countries a completely new law unknown before the arrival of the French ; to add a chapter or an article to the body of law which was in existence before the occupation. This is one of the very important aspects of social contact, for it has its direct effect on the comfort and the happiness of the subjects. In establishing themselves in overseas countries, the French create needs and duties which were non-existent before their coming, and they open to the natives hitherto unsuspected horizons. These new conditions and circumstances, whether the newcomers realise the fact or not, demand new regulations. Laws, of which the natives can have no conception, are necessary to regulate matters. By bringing the natives roads and railways, the motor-car and the aeroplane, by building towns and factories, by providing administration, the French create new relationships. New circumstances arise, which demand unheard-of rules—beyond the dreams of the native : highway, railway, and factory codes ; laws for the defence and protection of the worker—laws which have multiplied more and more in recent times—laws about insurance and compensation . . . a whole unprecedented body of law. When they introduce the currency system to people who have never known such a thing—it is usually unknown amongst backward peoples—metal coins and paper notes : this means an enormous change : the problems which in this connection leap to life are sometimes dramatic !

Such innovation has also various phases and may be introduced in two ways by *imitation* or *imposition*.

It comes about from *imitation* when the natives freely and spontaneously begin to feel new needs and thus come within the orbit of new arrangements. They experience new desires, and without the pressure or constraint of any authority, they follow French fashions and purchase French goods which become more and more freely used, without need for legislation. They are impelled by an urge which at times amounts to excessive passion. In this, *snobbery*, a wish to resemble the European, is one factor : another is simply *fashion* ; another is the new-found pleasure in *sport* ; all these combine to favour innovation.

In other cases the innovation may be *imposed*. It is decreed, it becomes obligatory, when the legislator in the interest both of the French and of the natives introduces new laws to meet

altered conditions and requirements. When the French built their railways, ports and roads, to carry motor-cars into the very depths of the Sahara, they were compelled to issue traffic and transport regulations and to impose new laws on the inhabitants to meet conditions which had not existed before the occupation. Whenever the French are—rightly or wrongly—of the opinion that utility, morality or humanity demand a new law, the authorities impose this unheard-of innovation on the native inhabitants whom it surprises and often shocks. Among such innovations are, for instance, the registration of births and deaths, the census, the family surname. It not infrequently happens, as in Algeria, that several attempts have to be made before these things can be imposed on the natives : such laws for instance as relate to currency, to traffic, to navigation, to credit and to loans. The Revelation of Law is a Revolution which must be imposed on backward peoples by anyone who attempts to rule them with a view to their comfort and progress.<sup>1</sup>

<sup>1</sup> [Such at least is the French theory and method of colonial administration ; British ideas and procedures are in many points radically different. See Lt.-Col. W. R. Crocker, *On Governing Colonies*, 1947. EOL]

## BOOK VIII

### PATHS OF PROGRESS

#### CHAPTER XLIII

#### DISAPPEARANCE

*Disappearance* was the fate of conquered peoples : the elimination—whether *total* or not, whether *desired* or not—of a human group.

This elimination was often *total* : the conquered people abolished itself in its entirety. This was the case of the Tasmanians and of the Caribbeans of the Antilles (with a few exceptions who still survive in the south of Cuba). *Elimination* is therefore the word.

More often, however, not all perished. In that case we speak of *depopulation*.

In some cases one or the other has been deliberate and desired. Conquerors have intentionally *exterminated* defeated peoples, not only as in early days by their armies of occupation, but in other cases at a later stage, when the natives appeared to hamper the new plans for development and the conquerors devised methods to destroy and wipe out the obstructionists. The great American Republic, only just born, drew up in 1778 an official scheme for the complete destruction of the Red Indians. About 1890 Carl Otto formulated the theory that it was best to exterminate the natives to the last soul so as to have a clear field and a free hand for action.

So there have been cases where the disappearance of the native population was desired and planned, but very much more often it has been reluctantly endured, the conquerors then seeing their subjects die off and being powerless to prevent it, despite their regret and their best efforts.

About 1850, a great navigator, Jurien de La Gravière noted with emotion when he visited Tahiti what seemed to him the inevitable elimination of the Maoris of Oceania by their mere contact with the European. This was the subject of a novel, *Les Immémoriaux*, by Max Anély (Victor Segalen) in 1907. His

*Immemorials* are the Tahitians, swaddled in their immemorial traditions, and unable to adapt themselves to order and progress : hence, in time, their elimination.

Public enquiries and private researches into this cruel and apparently fatal phenomenon are not lacking. Several of the great colonial powers have tried to discover why in certain places the natives should die out and their race become extinct. The English looked into the question of the Fiji Islands in 1896, and the Americans have frequently done so. There are also private researches which throw light on this melancholy drama, notably the great enquiry of William Rivers into Oceania.<sup>1</sup>

All this helps us to grasp the *degrees* and *agents* of the disappearance. As regards *degree*, there are cases where disappearance is total. Up to the present, and sometimes going back a century or more, there are countries completely depopulated. Almost always, these have been countries where the population was exceptionally backward—we hardly ever, or indeed never, find the complete and total disappearance of semi-advanced peoples—people, to be more precise, who were warriors or hunters, wild-food gatherers, trappers or plunderers who lived by trapping and pillage, and who were very far removed from the form of life which the newcomers were establishing. There is the explanation. Their social system was too infinitely far removed from the social system which must be set up in a colonial country.

We can thus only name the peoples blotted out for ever. Not that we possess exact statistics. Statistics are difficult to come by when you are dealing with primitive people dispersed over wide areas. If you wanted to count them, you would have to lure them down from the shelters where they hide in the trees of the forest. Such are the Pygmies of the French and Belgian Congo ; we do not know their numbers ; we know only that they still survive.

Even if it were possible to attempt a census, this would be difficult to interpret, particularly a census made in the past when it would always have been based on guess-work. At any time it would be imprudent to compare the census made in one country with the census of another, for methods of enumeration vary. This is truer of "new" countries than of our old ones. It is never possible to estimate depopulation or elimination in accurate figures.

<sup>1</sup> [*History of Melanesian Society*, 1914. EOL]

It is at least known or admitted that certain peoples are wholly extinct. From 1870 it has been assumed that the Tasmanians were gone. So are the central and northern Australians, though not the Australian aborigines of the south. It is believed that we have exact figures for the Kurnai tribe, famous in France for its institutions; in 1839 there were a thousand of them; in 1877 there were only a hundred and forty; to-day there are none!

As for the Melanesians, some tribes amongst the Kanakas of New Caledonia are now only names. Amongst the Polynesians some tribes more advanced, or, to be more accurate, less backward, have suffered the same fate. The Maoris of Tahiti (whose name is now written *Mahori*) were more advanced; they had arts, they were navigators, and great explorers; they have not disappeared, but they show a tendency to become reduced in number, and to get lost by interbreeding with Malays, Chinese and Japanese. The beauty of the type is now ruined.

The people of the Marquesas Islands, much more backward than the Tahitians, are nowadays on the verge of disappearing. In 1842, at the time of the occupation, they were estimated at twenty thousand or perhaps more; half a century later, in 1889, they were only four thousand five hundred, and to-day there are at most two thousand of them. After a hundred years only one in ten survives!

Two cases are attested in Africa. The Bushmen, a savage and backward people, headhunters and cannibals, pastoral nomads, and inveterate thieves, were almost completely exterminated by the Dutch Boers whose occupation of South Africa they were impeding. Amongst the Bantu Negroes of the French and Belgian Congo it seems—though exact figures are lacking—that the population has very seriously declined in the last fifty years. It is estimated, though not proved, that French Equatorial Africa has in thirty years lost two million of the native inhabitants, mainly through illness and epidemics.

As regards America, the facts must be carefully scrutinised. It has often been said that the "Amerindians", the original Redskins, must have almost entirely disappeared, not merely because they were ill adapted but also because—as there is no reason to question—there have at times been deliberate, systematic campaigns to exterminate them. This accusation was at one time true, but is so no longer. They are now confined in "reserves" where White Men are forbidden to travel or to settle,



and their population is tending to increase. Cooper wrote a hundred years ago of *The Last of the Mohicans*; and admittedly some tribes, like the Apaches or the Natchez, may have completely disappeared, leaving behind nothing but their name. Modern American censuses, however, which in the United States are very accurately compiled, show that the Amerindians, nowadays living most peacefully in their reserves in Oklahoma, are more numerous than they were twenty years ago. In 1900 there were two hundred and thirty-seven thousand of them; in 1910, reckoning in the half-castes, there were two hundred and sixty-five thousand.<sup>1</sup> They are no longer dying off as before. They are living more luxuriously, if not more happily, since by an unforeseen stroke of luck Oklahoma has in the last twenty years been dotted over with derricks. The royalties from the oil wells that have been sunk in their territory have brought them immense wealth. When I was in Texas I heard of Red Indian millionaires and even milliardaires. The same stroke of luck has, as we know, fallen to the Iraqis. In this up-to-date world of ours, slogans must be modernised! Nevertheless, in the New World of America, in the West and the Far West, some tribes have wholly vanished. In the neighbourhood of Alaska, the Haidas have decreased by ninety per cent., one out of ten only is left. They were a civilised people with an extremely beautiful art; fisher-folk, semi-nomad, yet possessing houses too and cultivating the soil, but more artistically gifted than industry-minded. The Caribs of Central America were of a lower human type. As early as 1683 we learn from a traveller that only sixty-one of them were then surviving in Martinique. In the Antilles, with the sole exception of Cuba, they have disappeared.

What are the *motives* of such disappearance? By what action have conquered peoples in various places either completely or partially eliminated themselves? There are two chief contributing factors: the *death-rate* and the *birth-rate*.

First there was a rise in the death-rate after the occupation of the country by the newcomers. Even before the White Man came, these peoples were dying too much and too fast. One reason was their lack of medical skill—save in exceptional cases their magic arts were no substitute. Another was that their institutions and traditions frequently demanded cruel massacres, desired by the gods, pleasing to the spirits, and therefore a work

<sup>1</sup> The same phenomenon is observed in the Hawaiian Islands where, according to Professor Andrew E. Lind, there has also been since 1900 an increase of population, due to a rise in the birth-rate.

of piety. There was for instance infanticide, especially amongst the peoples of Oceania ; many countries murdered off their baby daughters, many others murdered babies in general without distinction of sex, many others murdered twins from fear of the Evil Eye. Then there were funeral sacrifices when numbers were slain—often burnt—on the death of their father or their chief. There was the Ordeal too, "the judgment of god", and in particular the poison ordeal which in Guinea and Dahomey, especially under the name of "ordeal of the red water", caused the extinction of entire groups. When a sorcerer announced the suspicion that So-and-So had committed a murder or a crime, a whole village had immediately to undergo the poison ordeal to justify and purify itself. According to the rule of the game, it might possibly be wiped out. This institution frequently resulted in the self-destruction of large groups who out of superstition thus committed communal suicide. Many of the peoples who have disappeared, were already disappearing before the White Man came. The influence of the Whites which we observe, did no more than aggravate an ancient scourge which was already in full play. One of the reasons why these peoples made so little effort to resist their own elimination, was that their mental make-up and their legal system, their religion and their social customs were already fraught with death and that their power of resistance to the coming shock was thus undermined. In all the cases, especially in the Pacific countries, where we have accurate information, it is a question of peoples who were busily eliminating themselves long before the White Man came ; peoples under sentence of death, disarmed by their tradition, who were destroyed by the fatal shock.

We cannot deny that the White Man's arrival increased, and greatly increased, the mortality amongst the conquered peoples : and that in various ways. Sometimes there was systematic, organised massacre, premeditated slaughter, which was in ancient days the token of success. King Saul was dethroned in favour of David because after conquering them he had spared the Amalekites, enemies of the Jews. Clemency has not always been a virtue of kings.

More than all, there was the institution and spread of Negro slavery. When the White conquerors took slave labour with them from Africa to America,<sup>1</sup> they greatly raised the death-rate.

<sup>1</sup> [Without the slightest wish to whitewash the White slave-trader, it is fair to remember that Arab slave-traders had long been at their odious work before ever the White man came. EOL]

Far larger numbers of slave workers perished than of free workers. Spanish writers have recorded that in the Empire of Mexico and Peru, which the Spaniards ruthlessly exploited, the death-rate among Peruvian mine-workers was extremely high, quite outrageously high at times. We know from other sources that suicide was very common amongst the enslaved ; despair joined forces with tuberculosis to depopulate the forced-labour camps.

Finally, both in America and Oceania, came in olden days the fatal abuse of alcohol. More than two centuries ago, missionaries and governors strove in vain against it in Canada. All the traders and bushrangers who came into contact with the natives bartered alcohol in exchange for native products. The murderous craving for drink spread rapidly, despite every effort to check it. The extinction of whole tribes was due to this cause alone. It is the "fire water" which must be found guilty of this great, this undeniable crime against the Red Indians.

More recently, other factors, curious and surprising, played their part. Doctors are in general agreed that one factor in the depopulation of the Pacific was the adoption of clothing, which in that climate was injurious to the native's health. Governors and preachers on their arrival some hundred years ago immediately insisted on the Maoris wearing clothes : the ostensible reason was a moral one ; a secondary reason, about which they were discreetly silent, was that the cotton goods came from Manchester.<sup>1</sup> After a little time, the clothed natives died in larger numbers than their naked brethren, because they did not understand the correct management of clothes. They bathed and dived with their clothes on, they kept them on and let them dry, they became sensitive to cold, they caught fever, they reduced their own powers of resistance to sickness and intemperance. The introduction of clothing which was—partly at least—intended for the native's good and was therefore made by law obligatory,<sup>2</sup> worked out to their injury : which no one had wished or foreseen. It is often difficult to ensure the happiness of the inhabitants of distant countries.

It was illness, however, and "homesickness" for the past, which most gravely affected the death-rate.

<sup>1</sup> [Are there any grounds for insinuating that British missionaries were interested in the profits of the cotton trade? The simple and narrow-minded puritan of a hundred years ago believed nakedness disgraceful, and knew nothing of its hygienic value in the tropics. EOL]

<sup>2</sup> [The missionaries certainly urged clothing on their converts, but did British authorities ever *legislate* about dress? To the French of course legislation, as Professor Maunier makes clear, is the very air they breathe. EOL]

Illness, in the first place ; for the White conquerors brought diseases with them which they handed on to the natives. It is true that they had the skill to cure many diseases from which the natives suffered, but they gave others in exchange. Chief among these was the disease it is a disgrace to name, which had an infinitely serious effect upon the death-rate in Pacific countries. The intimacy of the whalers with the island women proved simply murderous.

Homesickness too played a large part. Not homesickness for a familiar place, but for a familiar *time*, the yearning for a vanished past, a yearning which became so acute and so heart-searing that the sufferers simply let themselves die. For we must remember that we are dealing with primitive and backward people who before the European's arrival lived in a state of torpor<sup>1</sup> and were therefore a world away from the system of life which the French had to impose on them for their own advantage as well as for the advantage of France. You could not allow the tribes and the towns to go on fighting and exterminating each other as before ; you had to establish peace, you had to ensure security, to open the door to prosperity. Nevertheless, the fact remains, there is no denying it, many Pacific peoples let themselves die out for sheer regret for the vanished past. Some twenty years ago, when I was travelling on mule-back through Kabylia from one tribe to another, I was chatting with my guide, and I said : "Aren't you happier now than you used to be ? You don't need nowadays to ride about with your rifle ready on your saddle." His eyes flashed lightning : "It was better then : in those days a fellow was alive !" <sup>2</sup> Living without danger was no life at all for this old Berber ! <sup>3</sup> I was conscious in his voice of a regret which in the case of backward peoples can, as we know, amount to so genuine and profound a despair that words to express it have been coined in the various languages of the Pacific. The Mahoris in their soft speech have called it "erimatua" or "tatareri"—the sadness which overcomes a man in recalling days when he was happy ! <sup>4</sup> In this case *bore-*

<sup>1</sup> [But did they ? Tom Harrison's *Savage Civilisation*, Malinowski's *Argonauts of the Pacific*, and many similar studies suggest rather that, while their tastes were not ours, their life was quite as full of colour, thrill and ambition and quite as well worth living as any European's. EOL]

<sup>2</sup> [Torpor ? EOL]

<sup>3</sup> [See Professor Maunier's earlier version of this conversation, p. 402. EOL]

<sup>4</sup> [Such melancholy is no monopoly of the Pacific Islanders. See the lyric poets *passim*—

"This is truth the poet sings,

That a sorrow's crown of sorrow is remembering happier things." EOL]

*dom*, which is said to be an element in progress, is actually a cause of death ! Such is the tragedy of expansions.

If the rising death-rate is the main factor in depopulation, a *falling birth-rate* is frequently contributory. The natives produce fewer children than they used to do : for them the decrease in the birth-rate may appear a sign of " assimilation " but when, as it often does, it sets in very rapidly it aggravates the effect of the increased death-rate.

In the United States, the holy land of statistics and the census, it has been proved that the birth-rate amongst the settled inhabitants is in inverse ratio to the rate of immigration. The more immigrants come in from outside, the fewer the children born to the established population. Generalising from these data, it is easy to imagine that the more rapidly white colonists arrive, the more quickly the native birth-rate will decrease.

In certain parts of the French colonial empire the rapidly decreasing native birth-rate may be due to a cause neither desired nor foreseen : the dissolution of the family group. The arrival of the French always shatters the father's authority ; as I have pointed out, they invent the individual, they set free the individual, they emancipate wife and child, and they thus weaken the family group from which there follows a fall in the birth-rate. This holds good in the French colonies, as in France itself.

Another factor in reducing the birth-rate, as we see among the Red Indians of the United States, is the White Man's reduction of the animals. These herdsmen and hunters lived by their animals, whether by slaying them or by breeding them. These wild or semi-wild herds had to flee before the White Man ; they scattered and disappeared. In less than a hundred years, the bison, which had been the Red Man's livelihood, had been almost entirely eliminated in the United States. It is difficult to find one nowadays. In order to protect the few surviving animals, who had by a miracle escaped massacre by the White Man, it has been necessary in America as in the French Empire to create large animal " reserves " like the Albert Park in the Belgian Congo and the Kruger National Park in the Transvaal. In 1795, when he went to the United States, Volney noted the disappearance of the bison, and forty years later de Tocqueville, in his famous book, laid the blame for the murder of the bison and its loss to the Red Indian on the shoulders of the White Man. The Red Indians have been given the horse in exchange, but it has not sufficed to save them. A similar cause

underlies the almost complete disappearance of the Australian aborigines. The two quarries of the Australian nomad, the kangaroo and the emu, the game on which they lived, were destroyed.

Let us note in conclusion, however, that when we imagine we observe the disappearance of the native, the loss may be apparent not real. In many countries the natives seem to have disappeared, not because they have been eliminated, but because they have blended and interbred with the newcomers. We must scrupulously distinguish pure-bred from half-caste.

Look at Mexico, look at Peru, look at Brazil. It is true that the indigenous inhabitants have disappeared, but we can by no means speak of elimination; they have mixed, they have blended, or they have faded out.

So true is this, that in certain countries the population has during the last fifty years been tending to increase, and that most markedly, and to the embarrassment of the French, since all these new inhabitants, who are continually getting born in immoderate numbers, require to be fed. This is the new problem with which the French are frequently confronted in Tong-King, in Morocco, and even in Algeria: too many infants are born.<sup>1</sup> It is not that the native woman is more prolific than of old; but fewer infants die, far fewer, since the doctor has come to save them and prevent their dying. There are already too many of them, and it is a tragic problem to find food for them all, and to encourage their emigration to other lands where they could live. If we have felt bound to discuss the disappearance of native populations through the White Man's "guilt", let us state that this is more and more the exception, and that, owing to the White Man's intervention the laws of Malthus are still in operation.

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<sup>1</sup> [The same phenomenon underlies "the Indian Problem": five million new Indian babies per annum; "self-government" might well have begun in the home. EOL]

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## OPPOSITION

The second and invariable effect of the contact of peoples in the colonies, is *opposition*, the hostile co-habitation in enmity of two peoples living in one territory. What then occurs is the *juxtaposition* of rulers and ruled. They are separated by material barriers, they are vigorously kept apart. They do not live in the same quarters, they do not live in the same areas. There is consequently no approach, no intimacy, no association between the two groups, nor can there be. There is separation, segregation, which is only the symbol of opposition.

Even if they live in the same town, they have no contact with each other : there is no society in the worldly sense. Circles and clubs are open only to White people ; " people of colour " are not admitted. The White Man's drawing-room is not freely open to " aborigines " or " natives ". A simple and convenient way of measuring how close is the social tie between ruler and ruled, whether there is approach or intimacy between them, is to ask whether they call on each other, whether each has what we might call *the right of visiting*, the privilege of intercourse, of being received : whether their houses are open to each other, even though it were only on specified at-home days during the season : common social events and " canvassing ".<sup>1</sup> It is rare to find this. There is sometimes an absolute dividing-line, admitting of no exceptions, of no relaxations, a real taboo on social intercourse ; a gulf yawning between the two groups. They rub shoulders in public or in private, on road or in street, in cafés or restaurants, without speaking to each other.

This dividing-line, more or less inflexible, is drawn by both parties and divides both ways. It is not only the White folk who wish to keep to themselves, for reasons which we shall presently need to analyse. The " coloured people ", too, have not wished to establish social relations, and have not thrown their houses open—not by a long way—to the Whites. Opposition, segregation, are mutual. To use an English word, for which there is in French no exact equivalent, there exists on both sides a certain " reluctance " : a reciprocity of disapproval !

<sup>1</sup> [It would be interesting to know in exactly what sense Professor Maunier uses this English word. EOL]



Truly deplorable as are its results, this opposition is by no means a simple thing. It cannot be abolished by a word. It has two sources, it flows from two springs : there are therefore two difficulties to overcome.

On the other hand, it has also two degrees and two *phases*. The first, and at the outset the stronger amongst backward or "primitive" peoples, is *resistance*, protest, even to the point of battle, by the ruled against the rulers. When this resistance has been overcome, as it has frequently had to be by force of arms, there then remains another phase much less obvious, but quite as inconvenient, a more or less veiled *repugnance* : a sullen, scarcely explicit resistance, which as a barrier is equally effective !

Let us take *resistance* first : open opposition of the ruled in battle, or protest, against the rulers ; opposition which is declared and proclaimed, and which displays itself in action and obstinate fighting. From the earliest days of European expansion, that is to say for the last three hundred years, all the great colonial empires have known times of sudden convulsive outbursts of resistance. There have never, or rarely, been continuous phases of real protest, but there have always been these sudden spasmodic explosions of hostility to the dominating power. Columbus had scarcely set foot in Puerto Rico in 1504 before a rebellion broke out, which he mastered only by his skill in playing the sorcerer. His instruments showed that an eclipse of the moon was due ; he warned the natives that if they did not return to their allegiance he would punish them by veiling the sky ! A few days later the eclipse occurred ; the rebels were immediately seized with terror at this evidence of his power, and forthwith submitted. The French have experienced such rebellions in Algeria and the Sudan, in Tong-King and amongst the Kanakas ; the English have twice known a Sepoy Mutiny, and a very prolonged rebellion in New Zealand from 1860 to 1867. For nearly sixty years, from 1873 to 1928, there were constantly-recurring rebellions against the Dutch in the Achin province of Sumatra : now here, now there, in fits and starts, there have been brief or lengthy insurrections. Resistance is rhythmic and cyclic. It has nevertheless its different aspects according to times and motives.

As to *times*, it finds occasion to break out at successive stages in the White Man's process of installing himself. The natives display opposition, in turn to his exploration, to his occupation, and to his settlement.

In speaking of the earliest stages of social contact I have

already alluded to resistance to exploration. The foreigners are often ill welcomed and prevented from reconnoitring the country. They are almost immediately halted by a sudden resistance to their arrival, perhaps at the first moment of disembarking: the first contact being a battle. Later their movements are impeded, their progress inland is often successfully prevented. As we have observed, explorers have frequently been forced to travel under various disguises. As in Morocco, the Sudan, the Sahara or Arabia, they have had to wear a mask, concealing their character of explorer, in order to penetrate the interior and make their observations. We must ceaselessly bear this fact in mind. By embarrassing travel, you embarrass trade, which follows exploration and rounds off its purpose. The *mercantis*, as the Moroccans call them, are also prevented from carrying their goods. Sometimes they fight to achieve their aims, sometimes at the start when they were strong enough, in Senegal, in the Sudan or in Guinea, they secured freedom of trade by paying dues to the local chiefs. Since these dues were customary the word "customs" has been applied to these taxes levied on the traders in return for permission to do business in the country.

So much for the resistance offered to exploration and to imports. There was resistance also to the intruder's occupation, for it has often been necessary to fight, and after long effort to win, in order to conquer the territory and gain a regular footing by hoisting a new flag. Such resistance has immortalised the name of Abd ul Qadir, who for twenty years prevented the French from establishing themselves in Algeria.<sup>1</sup> The French had to fight for two years to establish themselves in Madagascar. If they fight, if they conquer, the French do not do so for the pleasure of waging war, but because it is necessary if they are to establish themselves. When once they have set up posts and markets, and have opened warehouses and offices, they are driven to rule by armed force if they wish permanently to remain. For the sake of their trade, they are compelled to establish order and to impose peace, unwelcome peace, on inveterate and fanatical fighters. It took them twenty years to secure Morocco in the teeth of the Berber tribes who are nowadays at peace.

Finally, when the conquest is made, there is resistance to settlement. Having once occupied the country, the French

<sup>1</sup> [An admirable recent account of Abd ul Qadir and the French Conquest of Algeria is Wilfred Blunt's *Desert Hawk* (1947). EOL]

want to develop it. To do this effectively, people must settle there, and it often happens, as was earlier the case in Canada, that this settlement is prevented or delayed by the sedition of the original inhabitants. Long after their first occupation of Sahel along the sea-coast, the French colonists in Algeria were still in danger: and their towns were always fortified posts. At Boufarik, not far from Algiers, as late as 1840, not a day passed but some farmer who had strayed too far afield was killed by Arab horsemen! It takes a long time to wear down opposition in such countries. It persists among the "disaffected" and the "recalcitrants"; "black spots" of insecurity remain. "Military areas" have therefore still to be kept up—but under the direction of the civil authority—in the south of Algeria. In Morocco, in Tong-King, and even in Tunisia, there are districts still under military control.

It is one of Lyautey's many merits that he maintained that military government should be abolished at the first possible moment. He was not one of the generals who was determined to "stay" at any cost—to use the word attributed to Mac-Mahon.<sup>1</sup> He knew—Abd ul Karim's revolt was a tragic reminder—that there are times and places where military rule is essential if government is to continue and to maintain law and order.

Resistance has its *motives* also. It is of two kinds, it may be due to acts of the rulers or to acts of the ruled.

Not infrequently, after having been given a friendly welcome, the *rulers* have allowed themselves to act provocatively. They have devastated the country, sometimes massacred peaceful savages, and laid themselves open to accusations of treachery and perfidy, as Cortes and Pizarro did in the New World, when they lured native chiefs into ambush to torture or deport them. The fires of rebellion were kindled by the sins of the conqueror, and smouldered long in despair.

The state of mind of the *ruled* sometimes tempted them into deliberate rebellion. Contact is in itself a conflict which may lead to battle. It is a profound conflict on two related planes: the spiritual and the material.

The *spiritual* conflict is a religious one; it is often this which unleashes opposition to the rulers. Because the newcomers are ignorant—as at first they inevitably are—of the religion of the subject people, they are apt, without in the least intending it,

<sup>1</sup> [*J'y suis, j'y reste*—here I am, here I stay. EOL]

to wound and shock the traditions of the original inhabitants. They thus make themselves hated. This is the tragedy—one of the tragedies!—of the colonial world. They make themselves detested, without wishing to do so, by failing to understand the mentality of the people.

We have, here and there, striking examples of this spiritual conflict, for which there is often no remedy. Travellers were slain in early days in Guinea for having killed snakes. The snake was there a "fetish" or a god. When the White Men found one in their house and killed it, they gravely violated the established belief of the first inhabitants. Many were attacked for this reason. In another place, a traveller slew a sacred crocodile, to which the natives were in the habit of sacrificing a virgin on the accession of a new king. In this case the explorer was not killed; but the natives fled from him as impure. He could not resume relations with them until he had decontaminated himself, his clothes, and his possessions, by successive bathings, in order to purify himself from this mortal sin.

In New Zealand and in Australia, other explorers were attacked because they had broken a taboo by cutting wood for their fire. They did not know that a certain tree was traditionally sacred and therefore forbidden. They were pursued without knowing why. Let us remember<sup>1</sup> that one of the reasons for the two Sepoy mutinies in India in 1808 and 1857 was that the English, being ignorant of the views of their subjects, compelled the Sepoys to wear belts of cowhide or to grease their leather belts with beef fat; now the cow in India is impure and mere contact therewith contaminates. Hence the indignation which provoked the meeting.<sup>2</sup>

Not yet thirty years ago, a mission ran the risk of massacre, and escaped only by the skin of their teeth because they attempted to make a film. To take a person's picture, to photograph or to sketch him, is to capture and steal his soul; if you reproduce a person's features you imprison and take away his spirit. In such a case, general wrath is unloosed against the traveller. The mission had to leave all their material behind . . . Robbers of men's souls!<sup>3</sup> I observed in Annam also that this mental

<sup>1</sup> [But let us get the facts right! EOL]

<sup>2</sup> [If this naïve simplification of history were correct, surely the British were more than usually stupid to have learnt nothing about cow-taboos between 1808 and 1857! EOL]

<sup>3</sup> [The Quran of course expressly forbids any visual representation of living forms human or animal. Hence the "arabesque" decorations of Arab and Moorish art. EOL]

attitude was so widespread amongst the otherwise very civilised natives, that even in the towns they did not like portraits of head and shoulders only, for if, even figuratively, you bisect the human body you may magically bring about in reality the same result. To photograph part of a person is therefore an accursed thing : if you make a portrait it must be a full-length one ! If the mental conflict is a clash of ideas, it is also often a clash of prides. There are demands and ambitions which give offence, because they have unwittingly ruffled the pride of the subject people. The ruler has appeared to disdain or despise them. He has used this word, or done that deed, which has hurt their feelings. This is enough to stir up immediate opposition. The great Ashanti rebellion of 1900 in the Gold Coast and Nigeria had a strange origin. The English Governor had asked the native King's permission to sit on the golden stool which was in that country the symbol of royalty. He thought that as the representative of his Queen he ought to have the right to seat himself in her name on the royal stool.<sup>1</sup> This sufficed. It required a stern war to put down the rebellion that ensued !

In recent times the *material* conflict is the more usual ; this is a conflict of interests, not, like the other, of sentiment and emotion. A revolt may be precipitated if what the inhabitants conceive to be their interests are infringed by the deeds and acts of the rulers, though the rulers may have had no evil intention and may have acted merely with their usual ignorance of the native point of view. Even after an initial occupation, sometimes long after, it has sometimes been necessary to fight and conquer, or re-conquer, because native interests have been injured by the rulers. I once saw the spot where a famous event had taken place. As Chateaubriand has described it in his novel<sup>2</sup> there was in 1729 a revolt of the Natchez near the Mississippi. It ended with an ambush in which the colonists were wiped out almost to a man. More than two hundred of both sexes were slain without quarter. The cause of this revolt was the Governor's order to the people to quit their village and move on. This meant abandoning their cultivated fields, leaving the soil their ancestors

<sup>1</sup> [Almost every European at that time assumed that the Golden Stool was the King's throne. This was a mistake. It had been sent down from heaven by the God of the Sky and it housed the soul of the Ashanti people. The Ashanti King himself did not sit on it, but sat beside it and leaned his arm on the sacred stool. *Encyc. Brit.*, 14th Ed., s.v. *Ashanti*. EOL]

<sup>2</sup> [*Les Natchez*, written before 1799, during his exile in England, but not published till many years later. The two well-known tales *Atala* and *René* were originally intended for inclusion in *Les Natchez*. EOL]

had tilled, and the shrines where their forefathers were worshipped. As is not infrequently the case, the material conflict and the spiritual conflict were interwoven, for the possession of the lands was charged with religious significance.

The revolt of the Santals in the north of India in 1854 shows the conflict of interest in purer form. The Santals were preyed upon by Hindu moneylenders who expropriated them and drove them from their native country. When English judges came to examine the cases, they thought they were administering the law justly in upholding the Hindu contracts. When the creditor pleaded his case in the English court in order to get an order against his debtor, the judge held that the contract was valid and allowed the expulsion of the debtor. The Santals assumed that the English magistrates were the accomplices of the Hindu usurers.

It took two years (1854-6) to quell the consequent rebellion. The fault lay in the Englishman's ignorance of Santal customary law. If he had understood it, the contract should have been modified and the case tried in accordance with Santal and not with Hindu law, fighting would, no doubt, have been avoided.

In other places, this opposition on material grounds took a different form, and gave rise to what the English call Wars of Taxation or Tax Wars, such as were particularly noteworthy throughout West Africa. One of the blessings—or curses—which the conqueror brings in his train, is the tax which is indispensable for development and improvement. The tax and the budget are the signs and symbols of a State! The inhabitants must contribute a certain sum per head—however small a sum—for without revenue the resources of the “new country” cannot be advantageously developed.

So there it is! It has often been necessary to impose taxes on them—“impose” is the word—and in French territories soldiers have had to be entrusted with the job! Even in an old country like France fiscal systems have started in this way. Under Louis XIV it was still necessary to call out the royal regiments to collect the taxes in various places. Before the time of the French, the ruling Sharifs of Morocco had no method of bringing in the revenue save by despatching troops and *tabors*<sup>1</sup> into the very heart of the tribal country. It often happened that the soldiers scattered themselves amongst the people, and never either returned or brought in the required tax! It occurred

<sup>1</sup> [Moroccan cavalry. EOL]

several times in the Sudan that revolts were caused by an attempt to tax. And some forty years ago the English had to wage a longish war in Sierra Leone, the Hut Tax War, when they imposed a tax on dwellings.<sup>1</sup> Taxation represents progress, but progress which comes only by compulsion !

Contact may thus produce conflict ; but even mere contact, without conflict, introduces into the colonies the microbe of protesting "movements" which has already been at work in the mother-country. These overseas countries are liable to be infected, often very suddenly, by seditious movements in adjacent countries, in the heart, it may be, of some great colonial Empire, or in some neighbouring independent country, or even, as at the present day, in the home country itself. We can see these movements spreading under our very eyes to the French colonies to-day, in virtue of the almost-instantaneous modern methods of communication. This is the result of contact, of pure contagion, overleaping the seas, from states of mind artificially worked up at home in France. This is one of the phenomena of imitation, of transmission, of diffusion, which sociology has revealed. Even without conflict, simple contact between populations can arouse amongst a subject people opposition, protest, and often obstinate and hopeless resistance. Just as in our old European countries there have been infectious outbreaks and epidemics of rebellion, and as these rebellions have tended to break out in cycles—as we saw in 1789, in 1848 and in 1871, so in our overgrown colonial Empires. In 1792 the influence of the French Revolution attacked the Antilles, by pure and simple contagion conveyed in speech and writing : by orators and pamphlets. Martinique, Guadeloupe, San Domingo caught the infection. At San Domingo, as we know, it culminated soon after in the emancipation of the Negro slaves.

In 1868 there was the Cuban revolt, the result of infection from the revolution that had broken out in Spain ; in this case the contagion spread from the mother-country to her colony. At the present day <sup>2</sup> the plague of contagion rages worse than ever, demands and protests are made. In Indo-China, in Algeria, in the most distant and in the nearest French colony, the same mental unrest prevails, the same dissatisfaction with the government, even where no actual outbreak has occurred. The

<sup>1</sup> [The real cause of the "Hut Tax War" of 1898 was the British suppression of slave-raiding and slave-trading. The Hut Tax was merely the last straw. *Encyc. Brit.*, 14th Ed., s.v. *Sierra Leone*. EOL]

<sup>2</sup> [1942. EOL]

cause is diffusion pure and simple along the lines of which I have spoken.

Lyautey hit the nail on the head : Islam as a whole, Islam which extends from Tokio to Dakar, is like a gigantic sounding-box which magnifies the faintest whisper. The whole world is becoming more and more one world. The idea of liberty is gaining ground even in the colonies. A master is a master, even if he be a good master. Even the best of dictators has no protection against the dream and the desire of liberty.



## CHAPTER XLV

### SEPARATION

The feeling which often outlasts resistance is *repugnance* or reluctance : working always, in two directions : "from below upwards" and "from above downwards". It is a constant friction created by contact between rulers and ruled. It is especially marked amongst the latter and is a feeling analysed by American psychologists. There is at the University of Chicago an Institute, whose business it is to examine the relations between different peoples. Last year this Institute sent research workers to South America to analyse the mental attitudes especially of the black population, because it had been thought that they were suffering from what the psychiatrists, and particularly the Freudians, call an "inferiority complex" ; that they felt themselves inferior, despised and enslaved ; that the domination imposed on them condemned them to the degradation of their abilities and the suppression of their gifts. This would be the kind of thing which would explain the repugnance which is always felt in social relations by the inferior to the superior, by the ruled to the ruler, even where no manifest resistance is displayed.

This is why almost everywhere, to a greater or less degree, there exists in the colonies a certain separation in practice between the two co-habiting populations. It is strongest amongst the English, much less strong amongst the French. Even though there might lawfully be, there are not in practice the three bonds which unite man to man and people to people ; the three relationships which create a society. To use the Latin terms these three links are *commercium*, *mensalium* and *connubium*.

*Commercium* denoted the establishment of commercial relations, the sharing of common interests, the buying, selling and lending. *Mensalium* implied living and dwelling together, sharing the same loaf and the same stew or, at the very least, living as near neighbours, exchanging visits and invitations, being socially welcomed at each other's table and in each other's reception room. Above all, *connubium* meant mating together, whether in recognised marriage or irregular union. These three desirable social relationships have not, at least so far, existed in practice between

rulers and ruled, whatever the legal position may be. For we must not be deceived and taken in by the fictions of the law. It is legally permissible, especially amongst the French, to entertain natives, to marry natives, to do business with natives. In actual fact, however, separation and segregation usually still persist in these three relationships of everyday life. Without setting up an actual "colour bar" like the English, public opinion would look askance at any Frenchman who entered into commercial, convivial or conjugal relations with natives. This is the fact; let us look at it fearlessly in the face.

Nor let us weary of repeating that the instinct of separation works both ways; repugnance is not one-sided. For one of the reasons for this repugnance is the veiled hostility which prevails on the native side! Opposition begets opposition. The Native's hostility is often, as we have said, due to some actual aggression of the White Man's. The White Man's repugnance is often born of the Native's resistance. If French native subjects often feel an aloofness towards the French, the primary reason for this is the Frenchman's aloofness towards them. The *Frenchman's* aloofness is in turn perpetually nourished by *their* aloofness.

Now, understanding this mutual repugnance as a mental attitude and a social fact, we find that it assumes in the colonies various legal forms. The rulers frequently give legal countenance to this opposition and thus aggravate it by defining and proscribing it. The law-giver recognises the repugnance, draws conclusions from it, sanctions it and thus emphasises instead of assuaging it.

There are three legal forms, three phases which follow each other in a crescendo: *cantonning* the natives, *thrusting them back* (*le refoulement*), *segregating* them.

A *senatus-consultum* of 1863 decreed the *cantonment* of the natives. Its effect was to confine the Arab tribes to their ancient territorial limits, to enclose them where they were, and deny them the right to quit their district or to emigrate from it without permission. This decree however did not forbid the French to travel through or settle in tribal territory, hence it was not the severest measure of separation. Cantonment was a one-way measure; the exit was closed, but not the entrance: the original inhabitants were compelled to remain—barring exceptional cases—but there was nothing to prevent newcomers from moving in and settling there at their own sweet will, even settling permanently. This procedure had been adopted from the time of the Romans in

what they called "Mauritania"—the Maghrib of to-day. A rescript of Trajan's sought to canton all conquered peoples in their native territory, to prevent their entering too closely into contact with the Romans. The French introduced it not only in Algeria, but also, certainly in the early days, in regard to the Kanakas, as was not unnatural, seeing that the Kanakas obstinately remained cannibals. The explorer Béranger-Féraud proposed some fifty years ago that the cantonment of the Negroes should be introduced in Senegal, but he was not listened to, for this method of regimenting populations is no longer practised by the French, at any rate not legally. In Annam even the Moi savages have freedom of movement.

The *thrusting back* (*refoulement*) is not merely the wish to keep the old inhabitants rooted in the positions they were in when the French arrived, without expelling them therefrom. On the contrary its aim is to compel them to move further off, to transplant them to arcas more distant from the places where the rulers have themselves settled; the verb *refouler* expresses the idea perfectly. Two decrees of 1844 and 1846, at the beginning of the French occupation of Algeria, organised—though only partially—the transference of many tribes to the countries to the south. These were wandering nomad tribes who, it was thought, could not easily be adapted to the new order. When you feel that you cannot convert them to a stationary life, as has been done elsewhere, and teach them to cultivate the soil, you thrust them off to a distance where they can live as they like. The same purpose was achieved at the same time by the indirect method of . . . confiscation. When the tribes had fought against the victors, especially those tribes which had followed Abd ul Qadir, they were punished by the confiscation of their property, particularly their lands. This compelled them to move off, to make their way southwards and look for some place to live, far removed from the French. Confiscation was one method of *refoulement*. From the 1840's some theorists supported the policy of *refoulement* for general application, and went so far as to propose that all natives without exception should be transplanted to the South so as to leave French colonists free to occupy Tell and Sahel. A deaf ear was turned to such suggestions and the policy of *refoulement* is now out of date.

What is known in South Africa as *segregation* involves also, as we shall see, the transplanting of the natives. Not only are they removed to a distance, "deported" is the suitable word, but

White Men are forbidden to settle in, and sometimes forbidden even to travel through, what are significantly known as Native *Reserves*.

This is a procedure which was employed by the Jesuits in South America, in Ecuador and Peru, to segregate the villages they had founded for their converts. These villages were often very densely populated and very active under Jesuit direction. The Jesuits forbade any White Man to enter the concessions of the converts; they were thus able to govern their groups of converts without interference or criticism. It is in the United States, however, that this scheme came to full fruition in the Red Indian reserves. It has recently been used also in South Africa.

From 1786 to about 1880 the Americans set aside very spacious reserves for the Red Indians where they have ever since been confined without any White Man's having permission to enter, save in exceptional cases. During a period of fifty years the Amerindians were gradually transferred to these special reserved areas in the South and West, far from the then-existing towns, and far from the East, which had been the seat of the first White colonies. This procedure amounted to the confiscation without indemnity of all the possessions of these tribes. There was however this compensation that in exchange for the lands taken from them they were given other lands, though more remote, lands which these poor Indians have enriched beyond all expectation. No one could have anticipated the gain which would fall to their share.

The segregation of the Red Indians thus entailed the dissolution of their tribes. (We have in certain cases seen the same result in Algeria.) There was not only transference, not only confiscation, but dissolution too. For in deporting entire groups, and dispersing them as the Americans did, no one troubled to reflect that by scattering them their societies were broken up, their unity was destroyed, their traditions swamped, their customary law obliterated. From the social point of view, this type of segregation is therefore a far more serious thing than the French cantonnement or *refoulement*, for it means the destruction of the tribal order, the dissolution of the ancestral group, which often forfeits even its name, even the memory of its past exploits.

In more recent times it is the South Africans who have methodically introduced segregation by a law of 1913, greatly aggravated by subsequent laws, especially that of 1925.

To rid themselves once and for all of the nomad Bushmen or

Hottentots<sup>1</sup>—the most primitive of all primitives—after having vainly tried, so they say, to educate and adapt these people and having been unable to change them into settled cultivators, the South Africans transferred them into extensive reserves where they can continue their nomad life as in ancient times, without any White Man's having the right to enter their territory. Two rights have been guaranteed to the natives and to them alone : the right of occupying and inhabiting these lands.<sup>2</sup>

These three measures, especially the last, are eloquent of the interest felt in these primitive peoples, for it really seems that this stern legislation is the only means of preserving them. It appears that they have neither the gifts nor the capacity to adapt to a new order which is all too foreign to them, and that the only hope of saving them was to remove them to a distance. These measures are an indication also of another mental attitude : a moral sense of mutual aloofness, which may even amount to disgust and contempt, and which prevails in the South African countries among Black and White alike. The same is true, or was true, in other countries too. Was there not in France in 1840 a scheme suggested which went so far as proposing to transplant the Algerians to the Marquesas Islands and turn them into Oceanians ! At the beginning of European relations with the natives of overseas countries, many people had the idea that it would be better not to bother trying to adapt or to civilise them, but that they ought to be restricted to their cantonments or thrust back somewhere or deported, to live—or die—somewhere else.

In countries where the original inhabitant was more advanced and let us say cultured, as in Islamic countries, repugnance sprang first chiefly from the Musulman's feeling towards the White Man. The fact that social relations between the two have not been possible, is essentially his doing. You cannot enter a Muslim house ; it is very uncivil, even rude, to enquire about the welfare of the household. In such countries you may have, as I have had, old friends without having ever been, even once, invited to their house to meet their family. When you are invited, you are received in a separate place, a reception room for strangers, which is not part of the private house. In the Maghrib, this is often only a tent pitched afresh whenever required. We need therefore not talk of racial prejudice on the part of the French. It is true enough that the French are too

<sup>1</sup> [Bushmen and Hottentots are not identical, though they have certain characteristics in common. EOL]

<sup>2</sup> [Again, see Edgar Brookes : *The Colour Problem of South Africa*, 1934. EOL]

often guilty of it ; but all too frequently it is their subjects who have preserved it and increased it by their prejudice against the French. Contempt, if I may venture to use the word, is double-edged. Each side is blind of eye and deaf of ear. Contempt is repaid by contempt.

It is no pleasure to me to dwell on this unpleasant phenomenon, the opposition between ruler and ruled and its two phases, its two degrees, of resistance and repugnance. What we must notice is that these things have one common origin. If we want to eliminate them, as we should, in the present and in the future, we must eliminate their common cause which is ignorance, misunderstanding, lack of comprehension. It is the failure of human groups to get into touch because they are ill informed. They each decry the other because they do not know the other as he really is. Herodotus writing long ago about the Egyptians, bore witness in his Second Book to the lack of understanding which is the real source of opposition. We of to-day, aided by the progress of modern psychology, are better able than he to see how *logical* the conflict is. Rulers and ruled reason and think in radically different ways. The misunderstanding is fundamental. The natives of colonised countries are often in the stage of mental development known as pre-logical, as opposed to the logical stage. The power of reasoning amongst the original inhabitants of these far-off countries is not employed in the same way as ours. The reasoning of primitive peoples is prelogical not logical ; a mystical association or " participation " links concepts together according to laws *sui generis*. The very structure of the primitive mentality is a thing apart. Misunderstanding is therefore a conflict between two methods of reasoning : two groups of people, two different minds ; two men, two different reasons.

So there exists a mental conflict ; but on the other hand it is also a moral conflict, the result of which is that each side is all too little inclined to recognise and make acquaintance with the other, to penetrate behind its reserves and explore its world of feeling and thought. If mutual contempt exists, the reason lies in logic and feeling, or in " the logic of feeling ".

In order to clarify our mind amid these abstractions, let us try to define the attitude of mind that most usually prevails amongst the new arrivals in colonial countries. What are they in the habit of saying to still newer arrivals, travellers or colonists, when trying to enlighten them about the native ? Almost always—and I speak from long experience—they convey two

impressions : first, that the native is *inferior* because his manners and customs annoy the speaker ; secondly, that he is inferior because his ways *shock* the speaker.

The European is *annoyed* because native ways do not suit the White Man, native customs and traditions are an obstacle to the *comfort* which the ruler wishes to find. He is *shocked*, wounded, irritated, as well as inconvenienced, not merely by the annoyance but by the incongruity, the incivility, the immorality which he attributes to the native.

Being *annoyed* by the natives' traditions, you tend to decry them, you can't bear them, it makes you ill-tempered to have to put up with them. So the native seems to you an evil to be endured ! In what way does he annoy you ? By his lack of cleanliness, by his habit of using unguents, perfumes and forms of food which disgust you. The Kaffirs who offered hospitable gifts to travellers long ago presented them with milk in a vessel they had first rinsed with their urine to clean it ! The custom of the *Moussous* of Senegal and the Sudan of using rancid butter as a perfume—the more rancid the better—is extremely painful to the "stronger sex" ! The custom—which I have come across myself in my modest explorations—of eating and drinking in common from the same vessels, even in some countries of chewing in common, is also disgusting to the European ; so is the custom of eating lice or at best of saving their lives and discreetly depositing them on a neighbour. These are inconveniences that are annoying rather than wounding ; at most, in a material sense, they interfere with the comfort of the rulers. Lack of cleanliness, yes ; but also coarseness and familiarity. All these people living in tribes are accustomed to feeling themselves brothers, real or reputed brothers, and consequently all equal. Hence they treat Europeans, whether men or women, familiarly as part of the community ; they consider themselves at home in your quarters and indiscreetly make themselves at home all the time. What the European suffers from on this plane of everyday relations, is the sense of insecurity, instability and irregularity, for the native has ideas totally different from ours. He has not, for instance, any conception of duty or of punctuality, he has not even the elementary idea of keeping an appointment, which is the very foundation of our relationships. As I have said elsewhere, if we are to civilise all these backward peoples the first thing is to teach them—and it won't be easy—the idea of keeping an appointment. For an appointment is the

most elementary form of contract ! This brings me back to the question of logic. It is the conception of time, the basic mental "category" on which rulers and ruled are at loggerheads : the value of time and the effect of time.

That is the first fact—we are inconvenienced in material matters. The second fact is that we are spiritually shocked. It is here that contempt enters in, not merely simple ill temper. This is why we feel, rightly or wrongly, that the incongruity, incivility and immorality of the natives are wounding to the soul of the European, that they are morally, as well as mentally, our inferiors. The ancient Greek authors used to say that we call barbarous all whose customs differ from ours !

*Incivility*—or what is misunderstood as incivility—lies in the fact that the native's methods of living and acting shock our moral sense, ruffle us, sometimes outrage us. People have dubbed the Annamites hypocrites ; but they appear hypocrites because they think it polite not to cross a superior ; you owe him submission but you are not bound to tell him the truth. You must say only what will please him, not what happens to be true. The polite lie, what we might call the "respectful lie", is to the Annamite a moral duty. It is on this account that we misjudge this discriminating people ! Here is a profound moral misunderstanding.

Speaking of civility in the narrower sense, as applying to table etiquette, it is well known that in Algeria, Indo-China, Indonesia and as far as Japan, politeness demands that the guest should belch loudly to do honour to his host. One of the earliest lessons that a father gives his son is how to belch, and to belch nice and loud ! Imagine what the uninformed traveller would think, one of those modern tourists who have seen nothing, one of those reporters who have read nothing, when he is invited by some Moroccan host—for in Morocco too . . .—he thinks his fellow-guests disgusting and somewhat immoral when they are being most polite. You may be sure that he has forgotten an unobtrusive line of *Tartuffe's* which proves that in the days of Molière, that incomparable observer, it was in France considered polite if anyone belched promptly to say "God bless you !" and when someone had successfully brought up his wind to say "God help you !"

What is considered as *immorality* causes more serious friction. At every turn the European will stumble with a jerk on what seems to him indecent. Colonial novels are full of indignant comment on such matters. They talk of brutality and cruelty,



of savagery and barbarism: especially of the ill-treatment of women, old folk and children—without having always looked into the matter with sufficient care. The welcome offered to a guest is accompanied by courteous suggestions which to our thinking go . . . much too far ! All these things offend our ideals.

Suppose on the other hand that for one brief moment the French could project themselves into a native's skin, and adopt the attitude of mind of a French native subject, would they not discover that the Natives have plenty of grievances too, would they not find themselves inconvenienced and shocked by many of the conditions imposed on them by the conqueror's caprice ? Most assuredly. Some French subjects, especially amongst the more cultured, have already said so both in speech and writing. In vernacular books, some translated and some not, we can find a catalogue of their complaints, their mental and moral grievances against the French. The French annoy and shock them too, both in material and in spiritual matters. In Islamic countries you must scrupulously avoid using your left hand when eating, for the left hand is impure, having been cursed by Allah, and to use it at meals brings misfortune to the house ; it is reserved for secret needs. This is a point in which the European appears to them uncivil. It is advisable too to avoid the American mania for asking questions.<sup>1</sup> Asking questions is rude and unseemly. It is indiscreet. Nothing is more vexatious than to make enquiries and compile statistics. The French have had great difficulty in inducing their Muslim subjects to tolerate a census.

The European fashion which we associate with a taste for liberty, of mixing together regardless of sex or rank, going out together, eating together, dancing together, is indescribably abhorrent to the average Musulman. Their code demands that people should live in private, and not mix save amongst their own kind. The mandarin who saw a European speak to a peasant, or shake hands with a working man, live and go about publicly with his own wife—or another person's—would be shocked to the marrow of his bones. He would think it was the European who was primitive and backward !

To soften the shock, it is therefore to our own interest to understand and learn to sympathise with native feeling and tradition, so as to incline the inhabitants of colonial countries gradually to accept the new order without too much pain.

<sup>1</sup> [Samuel Johnson also held, as indeed does the Briton of to-day, that asking questions is no form of conversation between gentlemen. EOL]

## CHAPTER XLVI

### CONSERVATION

Disappearance, opposition : both are results which must always be considered regrettable. The French have however in many cases intentionally *preserved* customs and ways current among their native subjects, by pledging themselves to uphold—to “respect”, as the phrase is in their public pronouncements—the traditions of the earlier inhabitants.

This is achieved sometimes by *agreement*, sometimes by the *injunction* of decrees and laws.

When the French enter a country to annex or to protect it, they may make an agreement with the native ruler that the traditions of all his subjects will be respected. They promise the natives to respect their customary law ; this is a stereotyped clause in all the treaties of their Protectorates : in Morocco, Tunisia, Tong-King and Annam. On their side it is a pledge given under agreement. When Algiers capitulated on July 5, 1830, the inhabitants were assured that their religion and customs would be maintained. Whether this was a promise or not—the point has been disputed—it was possible to interpret it as an agreement.

By *injunction* or by legislation, they also laid it down that, exceptions apart, the law of the earlier inhabitants ought to be respected. The French have no general text applying to their Empire as a whole and proclaiming respect for native customs, but laws and decrees have been promulgated for specific countries and these provide the same solution for their whole colonial Empire. For Algeria there is, for instance, the famous *senatus consultum* of 1865 which defines the native Algerian as a Frenchman—a French subject, be it understood—but subject to Muslim Law. This amounted to proclaiming in formal terms that all the natives of Algeria would be governed in the future, as in the past, by their established customs. For French West Africa as a whole, there is an important decree of 1903 which adopts the same solution, and there are other similar texts for the other French colonies.

The French, however, always interpret this application of local customs in two different senses.

First, simply and directly, they mean *conservation*, in other words, they mean to uphold and preserve native traditions in the same form as they found them : this involves the compulsory petrifying and fixing by the French of accepted native usage. They find matters at such a point, they leave them at this point, and fix them there by their legislation.

There are various reasons for their doing so, especially two. They do it first out of tolerance, feeling that, if they are to live at peace with the natives, these people must not be unduly molested, their traditions must be borne with, even though they may prove inconvenient or perhaps shocking to the French mind. Living together involves compromise. Secondly, they do so because they approve and recognise these traditions. If necessary they accept them themselves, frequently recognising that it would be better for the French to follow the native tradition than their own.

That is the first sense in which conservation is interpreted. The second is the *restoration* of old-time customs, the revival of outworn traditions. They not only preserve the state of affairs which they found existing at the time of their arrival, they deliberately give a new lease of life to a state of affairs that is dead. Wittingly or unwittingly they turn back to the past ; they force on their subjects a "reaction", that is, a return to what has been abolished ; they set them to "march backwards" ; they compel or induce them to look back down the road they have already left behind.

Not only has the state of society found existing in Algeria, in Morocco, and in the Belgian Congo at the first moment of European occupation been preserved, but manners and customs which had already disappeared have been quite deliberately revived and re-established. Sometimes tribes have been reconstituted, sometimes chiefs have been restored. Attempts have also been made to recreate lost arts and crafts. This policy of reviving native industries which had died out, has met with great success, especially in Morocco. Rightly or wrongly, efforts have been made to rejuvenate dying cults, or to give encouragement to new-born ones. In Senegal and in the Sudan the French publicly took measures to encourage Islam, considering it a valuable transition between the animal cult of "fetishism" and Christianity, whether Roman Catholic or Protestant. So they have sought, not only to cling to and preserve the present, but they have turned back to a past which they thought preferable

and which they therefore wished to re-establish. This was the reason underlying the famous *dahir* of 1930 in Morocco, the object of which was to restore the old Berber code of law amongst the Moroccan tribes of the Atlas mountains who had already been converted to Islam, and were living under the jurisdiction of the *qadhis*, or Muslim judges, in accordance with the precepts of the Quran. The French decree restored to these tribes their old-time local and tribal codes of law. They thus attempted to put the clock back, and this decision created an uproar throughout the whole Islamic world. I happened to be in Egypt at the time, and I remember how vigorously the *imams* and the *shaikhs*, the professors of Muhammadan law, protested against this *dahir*—which was in fact a reversion towards the past.

If such is the idea of *conservation*, what are its *motives*? Why do the French usually desire to preserve the ancient native ways? Why, people often ask—not realising what a delicate business it is to tamper with living custom—do they not simply reform things, why do they not make it plain that they are progressive people whose steps lead forward? Why do they compromise with tradition, and respect the superstition, the “barbarism” and the routine of the tribes? Well . . . there are many reasons; the chief reason is that they often find it necessary, or at least useful, to preserve, or even to restore, old-time customs.

It is often *necessary*, because in the first place they are powerless to alter the tradition. They have made vain efforts to do so; the examples are many. They have passed laws and imposed laws; they did so even in Revolutionary days; they did so even at a later date when they thought that the native ought to adapt himself, as they said, to French ways. The colonial tribunals explained that their judgments were *Written Reason*—valid for every climate, under every sky! They tried it, but frequently in vain. The natives would not yield the point or tolerate the transformation of their age-old usage. They found means of resisting, various means, often indirect. One of the French reforms, much advertised and introduced at the request of the Kabyles themselves, remained a dead letter and was never applied, because the first person who sought to take advantage of it was shot dead!

It is often *useful* alike to the native and to the French. It is useful to the natives because they are accustomed to their own ways, because they are better off and can live more comfortably and more at ease when observing their own old traditions. It

is useful to the French who can without effort take over an established law which they need only apply and guarantee, without having to make a new order disturbing and destroying an old one.

By this method of preserving, and sometimes even restoring, the manners and customs of their subjects, they forestall—or hope to—the natives' degradation and dissolution by preventing the breach of tribal and family ties.

The English, even more than the French, have yielded to the pressure of this necessity, and have wherever possible adopted what they call "Indirect Rule".<sup>1</sup> That is to say, they govern through the pre-established authorities, making use of already-reigning kings and chiefs, consolidating the position of the native rulers in order to make use of it, by their support making the native rulers more powerful than they were before, sometimes making tyrants of them.

The result of this procedure can be seen in the French *sharif* country. Not only have the French kept on all the old chiefs, as in Algeria, but they have quite deliberately increased their recognised powers, they have made the chiefs stronger—and too strong. They have increased the burden of the "feudal system" in the Moroccan *sudd*; they have not only restored but exaggerated.

Another point remains for consideration. By what *means*, in what way, to what degree, and within what limits, can conservation be carried out? How do you set about successfully preserving, when you want to keep things as they are and not to change them? How do the French—who are normally such assimilators and propagandists—proceed, when they wish to "respect" native legal custom?

There are two methods, two degrees, two phases, that follow each other successively. First, the native customs are accurately *ascertained*, then they are *codified* in collections drawn up on the same lines as French codes. Ascertainment and codification are the two means by which the French accomplish this conservation of accepted custom in matters of law.

The first thing is, then, to *ascertain* the traditions of unwritten, oral law. This is fraught with considerable difficulty, for the incompatibility of prescribed and traditional law is more profound and far-reaching than might be thought, inasmuch as we

<sup>1</sup> [On Indirect Rule, see the writings of Lord Lugard and Sir Donald Cameron. BOL.]

are dealing with two radically opposed conceptions of law. French law is, by definition, territorial universal law, valid throughout the length and breadth of one country, while native customary law is a personal and also a religious law. These two characteristics of native law deserve examination.

A *personal* law is valid for the kinsmen or descendants of some individual in countries which are inhabited by clans and tribes, namely by groups of persons bound together by the ties of kinship. They call themselves the Children of So-and-So. Each individual is governed by the law of his kinsfolk; the law of one tribe is never the same as the law of another. Each tribe is a group of relations, formed and preserved by kinship and descent, possessing its own individual code of laws.

A *religious* law is governed by and steeped in faith in the gods; sects and churches have each their own peculiar code. In North Africa, even at the present day, there is one law for the Musulmans and one for the Christians. Each separate creed implies a separate legal code. Law is entirely an affair of religion.

When the French undertake to rule a country, their main idea is to give that country a code of law applicable to everyone, a territorial law and consequently a secular law independent of tribe or church, a law valid for relations and for non-relations, for the faithful and for the infidel. Such is the scope of the conflict.

These things being thus, other obstacles come into play the moment it becomes a question of ascertaining the traditional laws. For the law is usually oral law, verbally transmitted from parent to child, from greybeard to adult. It is, as I have said, "an inheritance of the ear" and is therefore difficult to ascertain and put on record. The French, especially French judges, require *written* documents and instructions, similar to French codes, if they are to administer this ancient customary law. That is why—as I have very fully demonstrated in Chapters VI and VII of my *Introduction à la Sociologie*<sup>1</sup>—a vast task has been in progress for more than a hundred years in the French Colonial Empire, in order to reduce the native traditions to writing, and register the customary law. The investigation was carried out by various agents; sometimes, in the early stages, by travellers, who gathered information as opportunity offered during their periods of rest, by chatting with the tribesmen about their

<sup>1</sup> With full Bibliography, 2nd Ed. 1939, *Presses Universitaires*.

traditions. Such travellers for instance as Binger and Duveyrier, have left original documents about the local customs of French West Africa. Much better informants were residents who came later to live in the country, officials and missionaries who remained for a long time, and who, having permanent contact with the inhabitants, were able gradually to collect their legal recipes, very often enshrined in proverbs. The residents who might be styled *observers* proper, were particularly the French administrators. Quite serious work, often deserving of admiration, was done in the French colonies by members of the administrative staff. More recently, both in the French and English Empires, Institutes have been created for the purpose of recording in writing the local customary law. These are official bodies, sometimes equipped with considerable funds, whose business is to organise "expeditions" of persons duly trained for the work, to make a lengthy stay and methodically to observe the customs and laws of the natives. These Institutes were first started in the United States, then in the Philippines; more recently they have worked in Nigeria and the Gold Coast and lastly in French Morocco. The French have a *Service of Sociological Studies* in Morocco whose aim is to observe and record the local facts. There is nothing equivalent in Algeria nor in French West Africa, where a recently published collection of "legal customs" is not free from grave faults, due to the lack of sufficiently qualified investigators.

If the traditions of local law are to be applied in practice, it is not enough to have a few scattered collections separately made here and there. They ought to be brought together, put in order, and properly arranged, if they are to satisfy the French mind. They must in fact be *codified* to ensure uniformity of legislation. They must be related to each other by a logical and discursive thread so that in the French colonies, as in France, it will be possible to judge by deduction and application. Codifying involves much more than merely ascertaining. It means bringing together and arranging in one common whole, in one compact body, observations written down separately and in isolation. To make use of another term, codification is *classification*: it is a change which goes more deeply. In editing, you pass from oral law to written law; in codifying, you pass from pre-logical to logical law. Traditional law was valid because it had always held good. If you ask a native why he considers such an action obligatory, and such another forbidden, he will always answer:

because our fathers did so. This is a datum which requires no explanation. But to codify is to link together, to explain, so to arrange the regulations of the old law that they throw light on each other and that the one serves as corroboration of the other. It therefore means introducing reason into the body of law ; carrying out a real intellectual revolution by substituting the logical written word for the pre-logical spoken word. It means in particular introducing into the customs of the country the two cardinal principles of all written law : comparison and contradiction. Comparison is the application : we say such and such an act is permissible on such and such an occasion, it will therefore be permissible on a similar occasion ; what is legitimate in this place will also be legitimate in that other place. On the other hand there is contradiction ; we say what is permitted on this occasion only, will not be permitted on any other ; what may be done by day only may not be done by night ; what may be done indoors only, may not be done out of doors ; what may be done only before, may not be done after ; and according to age or circumstance the act is therefore either valid or invalid. Before these conditions and restrictions can be applied, the regulations laid down by customary law must first be brought together and interrelated. The need for *unity* and the need for *clearness* will thus be satisfied. There is need for clarity since you want to understand, to analyse the matter to the very bottom ; there is need for unity since you want to put things in order and to relate your solutions to guiding principles. It is these two imperative demands of the French mind that have inspired this labour of codification in the French colonies.<sup>1</sup>

This labour has been carried out in two ways or rather by two agents : by the natives and by the French. In some places there have been authorities earlier than the French who have themselves reduced their ancient laws into a Code. Such codifications, made by people who later became French subjects, were sometimes of a public, sometimes of a private nature. There were public codes where the local ruler of the country, the king, the bey or the emperor, gave the order for codification. In such countries—all too few—the native himself revealed the native to us !

In Tong-King and Annam the Emperor Gia-long, legislator

<sup>1</sup> [An entertaining side-light on how the "imperative demands of the French mind" strike the Arab chiefs and nomads, and are translated into practice by the minor French administrators, will be found in Chap. XVI of R. V. C. Bodley's *Wind in the Sahara* (1947). EOL]



and king—whose tomb near Hué I have visited—secured the codification of the written laws of his country over a hundred and fifty years ago : a native Code before the French were seen. In 1881 the native sovereign of Madagascar had a Code of the local customs drawn up which is known as the *Code of the 305 Articles*.

We owe *Private Codes* to various native students who have enjoyed French education and been trained by the French in the study of Law. They realised that it would be of interest to reduce their native legal traditions to order, and they have published manuals of Customary Law which are thus compendia of Customary Law committed to writing. The Negro interpreter Musa Travelé compiled such a manual for Senegal. M. Dim Dolebsom, hundred per cent Negro, also published in my Collection a large work on Law in the Mossi Empire.

It can, however, be readily understood that this work of arrangement was carried out mainly by the French authorities themselves, in part by private in part by public effort. At first, and even to-day, private individuals have attempted to stabilise customary law ; travellers, administrators, teachers, have produced works, often remarkable works, in which they have embodied a whole *corpus* of customary procedures. There is, for instance, the great collection of Hanoteau and Letourneux ; for French West Africa there is the great work of Governor Clozel on the customary law of the Ivory Coast ; for the Sudan and the loop of the Niger there is the collective work of Professor Steinmetz ; and for the former German colonies the great collections of the law professors for the Kabyles of Algeria especially that of Kohler and Adam.

At the same time public action was taken on a considerable scale by the authorities of the colonial Empires, especially the French and Dutch, a big official undertaking. For thirty years the Dutch have been labouring hard, and have already published thirty-two volumes of their great collection of the traditional native law of Sumatra and Java. In addition to this, they have made another collection arranged, not according to geography, but under the heading of questions which they call *Pandects of Customary Law*.

The French set a similar work in train a long time ago. When Napoleon invaded Egypt he took a body of scholars with him, as well as soldiers, who studied not only the monuments but also the traditions of the Nile Valley. This expedition,

which from the military point of view had little enough success, has nevertheless left an intellectual record worthy of all respect : the great work in twenty-six volumes, known as *Description of Egypt*. In this Count Chabrol has described the customs of the native peasantry, the *fellahin*. The preoccupation of the French authorities with ascertaining, codifying, preserving and applying the legal customs of the native inhabitants may therefore justly be traced back to this expedition of Napoleon's. In Part II, I have already pointed out the great interest attaching to this expedition in relation to French ideas about colonies. More recently, in Algeria and Indo-China, in Senegal and the Sudan, the French have carried on work in the same spirit, though, as I have frankly admitted, this work is not without defects. In Algeria in the 1840's there was the great collection entitled *Scientific Exploration of Algeria*. In Algeria since 1905 there has been systematic codification of Algerian Muslim law. An advance scheme for a Musulman Code was published as a result of all this labour, but not put into practice ; for its author, the lamented Morand, had somewhat audaciously altered certain points in the Law of Malik.<sup>1</sup> In Senegal and the Sudan a noteworthy and sustained attempt was made to ascertain and codify the Negro law. With the co-operation of the French administrators scattered throughout the whole country, Governor Brévié compiled in five volumes a *corpus* of Negro customs. His method of procedure is admirable. The native customs, having been collected and assembled, are to be *revised* every three years, for the obvious reason that customary law is more flexible and infinitely less stable than written law. There is therefore the danger—and we have seen it in certain countries—that in committing ancient oral tradition to writing, you may freeze and petrify the law. It is far casier to modify oral law as required, than it is to permit the evolution of written law ! It is therefore most necessary to beware of the danger that codification may prevent the natural growth and change of customary law. Risking a poor play on words we might say that to codify is to mummify ; it is to crystallise, to fossilise, to prevent evolution, to turn the plastic into the rigid ; to fall from one extreme to another !

Codification serves to preserve, but only by adapting and

<sup>1</sup> [There are several great schools of Muslim jurisprudence. The one which has gained a firm grip of the whole of North Africa was founded by the great practising judge of Al Madina, Malik ibn Anas, who died A.D. 795. See Macdonald, *Muslim Theology and Jurisprudence*, Part III, Chap. I (1903). EOL]

transforming, since the simple act of codifying extorts logic from the pre-logical.

Well . . . and what are the *results* of this conservation ?

There are three which we must distinguish, and since they must have names we shall call them *consolidation*, *utilisation* and *amplification*.

When the preservation is perfect, when what was is retained exactly as it was, without addition or subtraction, we have *consolidation*. We respect what we have found and alter no iota. This is what our lawgivers aim at doing when they promise and proclaim, be it by law or by treaty, that they will not tamper with established custom.

When we exploit native usage to our own advantage, that is *utilisation*. For the purpose of domination we make use of local customs. We fancy that by preserving them we are making government easier for ourselves ; they play into our hands and serve our interests. Though it was in the first place merely a promise on our part, we discover that for our own purposes it is better to keep the old customs than to destroy them. We are naturally tempted to stress them, to rely on them, to strengthen, and in so doing to alter them. We make them subserve our administration, as in Algeria, Morocco and elsewhere, but without openly or directly altering them, and taking care not from prejudice to offend against them.

When we transplant the customary law of one region to other regions, we have *amplification*. We thus extend to populations who never knew them, regulations valid elsewhere, giving these regulations a "wider scope". Finding them operative in one place, we transfer them without alteration to another. We thus confront the natives with a brand-new law, not of French manufacture, but one created by other natives, near or distant neighbours. Those great inventors, the Romans, practised such amplification. They found existing in some distant country various customs which they extended without alteration to other countries, because they thought them either more useful or more humane. They frequently said so. In certain parts of Palestine there was a Jewish custom by which a prisoner was released at the Passover by the people's wish, and the Proconsul was powerless to veto their wish ; he was obliged to set free the prisoner indicated. Rome extended this tradition to the whole country, in order to soften the extreme severity of the Jewish penal law.

The French did the same thing in Madagascar. They found

amongst the Sakalaves and the Hovas an institution called the *fokonolona*, an ancient commune, and they created similar communes throughout the whole island in order to have living institutions to negotiate with, which could act and respond communally. For the same purpose they extended the Chinese "congregations" in Madagascar. The Chinese immigrants had here and there—not everywhere—formed themselves into a sort of religious association which had a chief and which answered for its members to the authorities. The French found this arrangement convenient, and extended it by law to the whole country. When, some sixty or seventy years ago, they founded Provident Societies (*Sociétés de Prévoyance*) in Algeria and Morocco, they were amplifying a customary practice of the country. In certain places the natives were in the habit of excavating "silos" or grain reservoirs by communal labour to preserve their cereal crops. Inspired by this silo-idea, the military in Algeria and Morocco instituted in 1868 the Provident Society which was to have so great a future.

In all these cases, however, whatever the results and whatever the methods employed, conservation necessarily involves alteration. For the real way to effect conservation is not obstinately or blindly to arrest development, but tactfully, discreetly,—if necessary secretly—to adapt, making a new thing out of the old. Not infrequently it has been possible to rescue the old customary law by a felicitous adaptation, carried out by some governor or administrator whose very name has usually been forgotten. We do not know who the Englishman was who induced the Ashantis to give up human sacrifice and persuaded them to substitute a sheep's head for a man's, one head for another. By copying the procedure of Abraham's sacrifice, he was able to retain—as much of the ceremonial as could be preserved!

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## CHAPTER XLVII

### ABROGATION

The opposition to the State by the tribe, the family, or the church, was bound in earlier days to lead to an abrogation of native customs. There are four aspects of such abrogation : its methods, motives, degrees and means.

There were different *methods* of abrogation. It could be effected purely and simply by *abolition*, by drawing a blue pencil through the old native law, or through such and such an item in the old verbal Code, without replacing them by any "provisions" drawn from French law. This was abolition in and for itself.

We have abrogation also, however, when a new legal rule—often derived from French law—is *substituted* for the rule sanctioned by customary law. In both cases, the old law is abrogated, in the one case it is not replaced by anything, in the other a new rule is substituted which is equivalent to *adapting* the old.

The *motives* of abrogation may be either the assertion of *authority* or the pressure of *necessity*.

The legal rules of customary law may be abolished merely to display authority, to confirm "sovereignty", and to demonstrate the ruler's power. In the very earliest days of the French occupation, people sometimes plunged hastily into new legislation, suddenly and without reflection, cancelling the old traditional law, without considering whether there was any need to do so, or even any advantage, or even whether it would be convenient to themselves to abolish it. This was obviously done simply for the pleasure of asserting the newly acquired authority, just as children use and misuse a new toy.

As early as 1664, Governor Tracy in the Antilles was instructed to wipe out all the Caribbæan customary laws without exception, and impose on the people the laws of the Kingdom of France. This was done—at least on paper. In 1858 when the French established themselves in the Marquesas Islands all haste was made to abolish the majority of the customary procedures of the country. It is easy to understand why cannibalism should be forbidden and also the blood-feud, which was all the rage in the islands and was fast helping to depopulate them. There were

other prohibitions, however, for which it is not easy to see any necessity: the people were forbidden to tattoo themselves, to sing or to dance, to visit the altars of rude stone where they were wont to perform the worship of their old gods . . . In these things the sheer lust for "displaying" authority is unmistakable . . . It is a natural law that all power is inclined to assert itself, in order to impress the wielders of power themselves as well as to impress others.

In the Philippines at the beginning of last century, the Spaniards also set themselves to destroy root and branch the customary ways of the inhabitants. The French have at times toyed with the idea of doing the same, but they have never ventured to push the process through to the bitter end. Yet in Algeria a decree of 1886 revealed their desire to assert their sovereignty, merely for the sake of displaying it and for no other reason, by abrogating the old customary code of law. This decree assumes that in future French law will be the common law, and that Muslim law will be the exception. This was a complete reversal of French policy, for hitherto French law had not interfered between Algerians except when this was necessary to maintain public order or in certain exceptional cases which were specified and enumerated; that is to say French law was in the background not the forefront of the scene.

When abrogation was due to *necessity*, it was carried out more openly. While spiritual imperialism reigned, a moral obligation was felt to promote the cause of humanity. Plutarch in his day (*Roman Questions* 83) wondered whether native traditions in the colonies should be abolished in all cases where they were barbarous and cruel; he wondered particularly whether an end should be made of the sacrifices of women and children. His conclusions were extremely tolerant and prudent . . . but he had at least raised the question of moral obligation.

Then the question of social necessity arises; more or less urgent material interest: let us call it *utility* or at least *convenience* both for rulers and ruled. Since the French go to the colonies to "develop" undeveloped resources; since they therefore govern there for the benefit of the inhabitants old and new, they must establish *comfort*, and in the first place material comfort or well-being. For if the verb "to civilise" has any practical meaning it is this: to provide material comfort. Whenever the pre-existing system appears contrary to the needs, the utility, or the conveniences of the new comfort it will be in part or wholly



abolished. The connotation of "comfort" as understood by the French was firmly defined by Quesnay. He used to say that the benefits of all government are security, liberty and property. Those were "the rights of man" in 1789. Auguste Comte insisted that order and progress must be assured: no progress without order, but also no order without progress. In a report of 1847 on Algeria, de Tocqueville said that for the natives the advantages of French expansion were: "first security, and then simplicity and rapidity". These things should be given to the colonies by abolishing where necessary the provisions of their old system which are incompatible. To make his point clearer let us say that the French must—or think they must—abrogate the customary law of the colonies when it threatens to interfere with *security or prosperity*.

The first benefit to the colonies, which the natives never knew before the coming of the Europeans, is *security*. Security covers many things: security of *person*, of *goods*, of *justice*. Security of the *person* means the native's being able to come and go without risk of life. This implies the abolition of vendettas, of cannibalism and of head-hunting, the abolition of human sacrifice, male or female, of infanticide, and in particular of widow-murder. Security of the person demands the abrogation of age-old, deeply-rooted traditions. Security of *goods* means putting an end to the despotism of the sultans, who expropriate and confiscate without indemnity or compensation: an evil practice kept up as we know by many a "republican" government overseas. Instead, the French aim at giving their subjects the privilege of keeping and preserving their possessions without fear of these being arbitrarily seized or plundered by any authority, though this means abolishing various regulations of the old system. Granting the colonial native the certainty of regular and guaranteed justice brings him security of *justice*. To do this, it is necessary to abolish the right, which rulers and tribal councils and heads of families used to possess, of administering justice without any supervision, according to their uncontrolled arbitrary caprice; the right which native kings exercised of deciding the fate of any of their subjects, simply in accordance with their own mood and temper, and of prescribing penalties without taking account of any accepted standard. In the more advanced countries, the Muslim Qadhi or the Jewish Rabbi was free to pronounce "arbitrary sentence" on an accused, simply at his own whim, without being bound by any tradition. This type of insecurity

had to be got rid of; rules had to be laid down and powers restricted, if the rights of the individual were to be guaranteed.

Another benefit is *prosperity*, the *possibility* and opportunity given by the French to the native to develop his resources and increase his wealth. "Enrich yourselves!" is the watchword. This is one of the reasons, often the main reason, of the prohibitions the French have decreed. Everything in the old system which put the brake on the increase of prosperity, everything which militated against the convenience or advantage of the population as a whole, had to be abolished or restricted, abrogated or at least modified. Two items frequently recurring in the old customary law were particularly harmful: *destructions* and *obstructions*.

*Destruction.* In many cases it was a religious obligation to destroy or to bury things of great value. There were sacrifices of men, women and children—a destruction of vital capital. There was destruction of property, movable or immovable, especially of animals. Large-scale sacrifices of cows and buffaloes were prescribed on the death of a sultan; in the Celebes this might run into thousands. Reluctant as the Dutch were to interfere with the *Adatrecht*, they were compelled to forbid animal sacrifices which were ruining the native populations. Certain tribes slew in sacrifice all their animals—or almost all—thus robbing themselves of their entire livestock!

*Obstruction.* The old customary law frequently stood in the way of development, and its traditions hampered productive progress. There existed in Dahomey the custom that persons in mourning must abstain from work for a whole year, and this practice uniformly prevailed until the French came. It is not tolerated in these days of restless activity. When a family ceased to cultivate its fields this spelt starvation, and government had to intervene to get rid of this ancient taboo. In most countries, but especially in Negro countries, there was great abuse of festivals and orgies, such as France had suffered from in olden days. The problem was in fact the same, or closely akin, so true it is that everywhere progress is bound to move along the same lines. It was imperative to put a stop to the natives' inveterate habit of spending their time in dancing and festivity, wasting months that should have been spent in productive work and thus unwittingly bringing famine or scarcity on their heads. These are the things which obstruct progress. The diversity of these obstructions that must be got rid of—picturesque though

they sometimes are—is illustrated by the serpent-worship of the whole Sudan. There is not a house in the whole of North Africa which does not keep one of these reptiles, though of a harmless kind. In the Sudan and in Dahomey, on the other hand, the serpents kept are often poisonous. They are taboo and you must not kill them, though they invade the White Man's house as well as the Negro's. Captain Leonard has reported that on the Lower Niger whole towns are infested by pythons which are held to be ancestral. In one place only a big fire was successful in getting the better of them ! And what a waste of chickens to feed them ; the destruction of all the feathered livestock, you might say ! All these snakes, crawling from house to house, devouring the fowls, touring the alleys in gangs up to four or five at a time ! If you find one on your premises you must make enquiries to find out whose it is, and restore it to the owner, after the priests have performed the necessary rites. The English who, as we know, are very chary of interfering with local customs, had to take indirect steps—a thing they are fond of—to end serpent worship in Nigeria without explicitly forbidding it. In Negro religious ritual orgies were a danger ; the use of ordure and excrement was too common ; prostitution, homosexuality and bestiality were rampant . . . All these practices are calculated to injure the people, even from the merely utilitarian point of view—quite apart from the moral. They are prescribed or tolerated by native religious tradition. So even if you are Dutch or English, and reluctant to take action in matters of native custom, you are sometimes driven to intervene and abolish or modify.

Such are the reasons for abrogation ; what are its *degrees* ? Two must be noted according to whether a custom is abolished *unreservedly* or *conditionally*. Such and such an act or deed may be absolutely, totally, unreservedly, forbidden. That is the French idea of public order : not to permit such and such an item of the old system to be endured or tolerated. Battle is then directly joined. It sometimes happens that the prohibition is ineffectual and resistance to it successful. When you forbid child marriages, for instance, amongst Hindus or amongst Muslims, since these obviously endanger the prosperity and the health of the native races : a sullen secret obstructiveness is met with, so strong that the registration department is powerless. When the French forbid the Berbers of Algeria and Morocco to allow a father to fulfil what he conceives to be his duty by

killing a daughter who has been guilty of adultery—I can personally bear witness to the fact that this is done; I have known it—the people disobey and the murder is carried out. No relative, no neighbour dreams of denouncing the murderer, for they believe that what he did was right.

*Conditional* abrogation may work out better. People may be forbidden to follow such and such a custom in future, but be permitted to keep it up for the time being, a longer or shorter time-limit being conceded. The French do this in Algeria, in Senegal and in the Sudan. They do not absolutely forbid such and such a native rite, but they insist on a permit's being obtained, authorising the celebration of this rite or that festival. They realise that it is prudent to tolerate the ancient custom for a certain time; they do not accept or adopt it but they temporarily suffer and permit it under government authorisation. In Algeria, in accordance with the law regulating the *indigénat*,<sup>1</sup> an official permit is necessary for the begging pilgrimage known as *Ziarah*, a sort of tax levied for the benefit of the Marabouts. Similarly permits are required for public banquets which give opportunity for dissipation; for opening a Quranic school; for sheltering vagabonds, which was traditionally a moral obligation, hospitality being a religious duty. There are traditions which the French dare not wholly abrogate, but they wish to remain the judge of when it is opportune to tolerate them. Hence they insist that in every case permission must be asked and obtained. That is how matters stand in practice in the Ivory Coast. Without formal or express permission being given, officials at their discretion tactfully "turn a blind eye".

During a period of transition it is possible to let ancient customs die a natural death, customs which no one would think of rudely abolishing at once. A great student of the Negro soul justly said that to reform with real success you ought at first to proceed by half measures, you ought to seem to be retaining while surreptitiously undermining. You would for instance preserve the duty of paying compensation or "compounding" by an indemnity in the case of a blood feud. He suggested—this was thirty years ago—that you could preserve the theory of putting habitual robbers to death, while arranging to connive at their escape; you could retain certain sultans and petty kings with all the outward appearance of arbitrary power while gradually neutralising it.

<sup>1</sup> [See p. 708. EOL]

Finally there are the *means* of abrogation, the procedures by which you can intervene to put an end to the old system, whether immediately or in the future, whether openly or discreetly. The French have three means : *suggestion*, *agreement* and *injunction*.

First, there is *suggestion*. By teaching and education you may subtly incline the natives spontaneously to give up their ancient traditions without their feeling that they have done so under pressure. This is the purpose of the *palavers* in West Africa and the *shikayahs* in Algeria and Morocco : spontaneous friendly conversations between ruler and subjects to convince them that they have every right to abandon their traditions and that this would conduce to their convenience and advantage. Since the days of Faidherbe and Galliéni this method has been successfully employed to induce the Negroes, by free discussion, to consult their own security and prosperity by giving up their old system. It is desirable to induce them to stop burying their dead in their huts ; to stop taking a pride in challenging each other to drink till they end by rolling on the ground ; to give up their superstitious dislike of taxation and their dread of the census—which as I have said the primitive mind counts as a sin. It takes a long time to wean them from their fear of being counted. It is sought to stop the practice of giving false evidence in regard to kinsfolk ; to persuade them not to multiply the worst extravagances of making gifts and presents especially to chiefs and Marabuts who used to live on such tributes ; to induce them not to soil paper money. It required a whole long course of education, which ended however in success, before the Senegalese and Sudanese could be prevented from despising and defacing bank notes. It is still more difficult to wean them from blind belief in *griots* and sorcerers : more difficult, and so far unsuccessful.

In the Philippines an equally liberal method has been tried to induce the inhabitants of the interior, barbarians to a man, the Nigritos of the central highlands, to compound a blood feud by a money payment as indemnity. A Philippine chief took an immense pride in hanging as many human heads as possible round his verandah ; the more smoke-dried enemy heads you could display, the better your chance of a brilliant marriage ! First the Spaniards and then the Americans have, so they tell us, been extremely successful in abolishing head-hunting in certain places ; not, they explain, by forbidding it—which would have been useless—but by skilfully, patiently, elaborately, and by very slow degrees introducing substitute satisfactions,

taking account of the well-known evolution of head-hunting practice.

Suggestion often leads on to the second means of abrogation : by *agreement*. When you are dealing with advanced people, you may be able by simple discussion, without any insistence, to persuade them willingly to agree to renounce such and such a custom or such and such an item in their customary system. Amongst the Ancients a certain Tyrant of Syracuse, Gelo by name, signed a great treaty with Carthage, in which the Carthaginians pledged themselves to put an end to their customary practice of infanticide. In recent times, this procedure of abrogation by voluntary or imposed agreement has become common. The English in India have in the course of a hundred years repeatedly made treaties modifying the murder of children and widows. In 1812 the East India Company signed treaties with several Indian rulers to abolish child murder which was a custom prevalent among the Indians. These treaties were known as *sanads* and their number increased under the Crown. In Java the Dutch negotiated with various rajahs to get them to abolish widow-sacrifice, a custom which was very much alive amongst the Javanese.

Lastly comes the *injunction*, when the force of the law is called in to forbid a certain practice. The legislator decides that the old custom must no longer be kept up ; this is civilisation by legislation. The procedure has its ancient as well as its modern history.

In ancient times the law of the vanquished was abrogated by injunction. In Palestine and in Syria the conquerors forbade both human and animal sacrifice, the law of retaliation and the blood feud. They abolished mutilation and they weakened the power of the family. We learn from many inscriptions that they forbade family clans to pursue either an active or a passive vendetta. They thus acted as active reformers.

In modern days the French have not been afraid formally and publicly to announce that they abolished by law such and such a rule of the pre-existing system. In so doing they were frequently confronted by vigorous protest and resistance, especially amongst peoples of the more advanced type. A French decree of 1870 granted French nationality to the Jews—almost all the Algerian Jews—thus making them subject without restriction to French codes and laws. This automatically prevented their practising their old Mosaic legal system. From the first moment

they resisted, wishing to preserve their customs of polygamy and the levirate—the obligation for a man to marry his deceased brother's widow. The Rabbis had to exert pressure by interdicts and religious sanctions, such as refusing the rites of burial, before the recalcitrants could be induced to give in. Decrees of 1874 and 1880 deprived the Kabyles of Algeria of their traditional tribunals and their tribal and communal jurisdiction, replacing their *jama'a* by French justices of the peace. Their resistance to this has long since died out. The truth is that, unknown to the French, they quietly retained their ancient tribunals for their own private use.

Abrogation of ancient customary law has always taken and is still taking place, tending to establish in the French colonies if not a *national* at least a *colonial* order, more comprehensive in fact than the national order, less narrow, less close-knit, since it compromises with the time-honoured native system by recognising polygamy, repudiation, and many other characteristics of the earlier law.

## ASPECTS OF TRANSFORMATION

Conservation then, naturally implies *transformation*, which, as I have said, may be *spontaneous*, or *suggested*, or *imposed*, and which is bound to take place, always and everywhere, whether desired or not. The question for the subject peoples is therefore not one of preserving their ways unaltered, but of changing them either in defiance of, or in accordance with, French wishes.

Changing them : how, how far, and to what end ? What is the *test*, we might say, for any given people of whether it will be able, and will know how, to change its ways to advantage ? Malinowski for the Pacific Islanders, and other anthropologists for the Africans, have tried to calculate the power of adaptation of a black race. The capacity for self-alteration which we want by some method or other to estimate, depends primarily on the nature of the climate. Bastian noted that the inhabitants of distant countries were more inclined to progress, and better able to achieve it, if they enjoyed a temperate climate than a tropical one. The dwellers in extreme climates were, he thought, less adaptable than those of temperate climates.

As regards the change itself we must note its *degrees*, its *subjects*, its *methods* and its *objects*.

There are various degrees of transformation of which the two principal are *reception* and *adoption*.

*Reception* : The native may accept for a moment, not for ever, provisionally, temporarily, some "item of culture", a way of acting, an object of use. He may put on shoes, don a hat, purchase European products, fling himself on to symbols of European "progress", such as are to be seen in shops or markets, such as are illustrated in European "catalogues" and "magazines" which circulate everywhere. He accepts for a moment ; one article perhaps to-day, to-morrow another. In this early stage the manners and customs of the dominant people effect no real penetration amongst the natives ; they change their minds, they try this or that and give it up again ; these fancies of theirs—it would be misusing words to call them "conversions"—are of no duration ; they are matters of *fashion*, not of *custom*. The wind may change—as it does in France too. If



the natives are ignorant of the latest fashion in the dressmaker's sense, the French show it to them.

*Adoption* : indicates a deeper kind of change, when the native permanently accepts and definitely steep himself for a long period of time in the ways of the ruling people. Whether he does so entirely voluntarily or not, is not the question ; he has assimilated himself intimately and profoundly to his rulers ; or, to use an Americanism, he has " acculturated " himself. Complete acculturation means adopting a culture in its entirety, down to its very depths, or at the very least adopting its major distinguishing and characteristic " features ".

Reception is of a day, adoption is for ever. Reception is of material objects, adoption is of abstract concepts. These are the alpha and omega of transformation with the whole rich range of the alphabet between. To be " assimilated " or " acculturated ", it is not enough to wear—as they do in the Sudan or Maghrib—sock suspenders !

The *subjects* of the transformation are those who are more or less strongly affected by it. Not all will be, but individuals will become *carriers* of change, either *receiving* or *adopting*. It is rare to be able to talk of a whole society or group becoming transformed *en bloc*. It does of course sometimes happen, and we do not deny it, that an entire kingdom reforms its manners and customs, and even its law, because the king is still the almighty master and wills it so, and his subjects follow him.

More normally, however, the French have found that only certain of their subjects play a part in the transformation, sometimes it is the younger set and sometimes too—for in real life nothing is perfectly simple—it is the older ones ; but more often, as in Europe, it is the young people who make revolutions. Sometimes it is the men only, and not the women who, at the outset at least, are less exposed to the new influences. It may then happen that after a time there arises a cleavage between the sexes, who are alienated not drawn together by the change. The atmosphere of the *salamlik* is changed, but not by a long way the atmosphere of the *haramlik*. Hence arises a mental and moral divorce between man and woman which is one of the dramas of the East. It is only the men who turn to the French.

More than that : in one sex, or in one age-group, there are certainly at the start, only some individuals who turn Frenchwards ; progressively-minded people loving novelty ; amateurs of the new, not its haters ; those who from temperament, or

perhaps from ambition, are ready to receive or to adopt French ways. At the beginning they are few. They have to cut themselves off and separate themselves from their fellow-countrymen. They are thenceforward in a class apart, men morally uprooted who have drunk deep of the cup of progress and have broken with that past to which the rest of their kind are still in bondage. These transformed, advanced, "evolved", individuals present a great problem to the French. For a very long time they form a small minority severed from their own community, who must be placed under some special system; they must be considered apart; and, however reluctantly, the French must treat them apart.

There are various *methods* of transformation. We must here make delicate distinctions and ask ourselves no longer *who* and *by whom* and *how far*, but *how* and in what way, the change of institutional order can be brought about. How can local traditions adapt themselves to the needs of the new order?—this is a problem of sociology.

Briefly, it is fitting to distinguish four methods of change, two of which we have already spoken of: the native tradition may be *abrogated* or *confirmed*, *degraded* or *altered*. The need to define must never tempt us to forget that this great phenomenon is one and indivisible, that it is always a simultaneous *abolition*, *conservation*, *transformation*, and *adaptation*, and that it is also *innovation* and *invention*. If then there is first, as we remember, abolition, abrogation, as a first aspect of transformation, there is also transformation itself in its three aspects: confirmation, degradation, alteration.

Taking *confirmation* first; this is a recall, and a useful one, this French preservation of ancestral custom, a conservation which, as we have seen, may be a *restoration* or an *intensification*. It becomes a transformation none the less—as I have pointed out—from the mere fact that the means the French employ to preserve the tradition are new and introduced by the French. Thus the ascertaining and editing of the old customary law is assuredly a transformation, since in order to maintain the local native customs the French have translated them from oral into written law. To preserve the substance, they change the form by certain and sudden revolution.

It is, however, often the subject peoples who spontaneously transform themselves to procure the confirmation and continuance of their ancient usages. It was quite recently discovered

in a remote corner of India that the Post Office was receiving human heads, correctly packed to be sent by parcel post. The reason was that in those parts every would-be husband was bound to cut off an enemy's head and send it to the family of his future wife. In order to send it quicker and to a greater distance, he was making use of the English methods of despatch and delivery, and was sending the necessary trophy by parcel post ! Government had therefore to forbid this particular adaptation of custom ! In acting thus the native was freely and spontaneously confirming the ancient custom of head-hunting while exploiting the novel facilities !

We do not need to go so far afield. From the mere fact that in many places the French for their own convenience exalt and magnify the native chief, as they do in Morocco, they confirm and intensify the earlier state of affairs, and at the same time by the same act transform that state of affairs. Once again we see that everything is interlinked : they change by preserving ; they preserve by changing.

Secondly, there is *degradation*. Very frequently, perhaps indeed too frequently, the new order undermines and degrades the local customs without the French as it happens being able to prevent this ; realising it perhaps, but seeing no remedy !

Thus they shake the chief's authority after having first shaken that of the *paterfamilias* who reigned over the kindred. Amongst the more backward they shake also the authority of the old man, the ancient of days. Once again this occurs without their being able to avoid it. The mere fact that the French are forced, by the French and for the French, to administer the country and consequently to "nominate" some "administrators". This inevitably impairs the authority of the chief, of every chief, in all surroundings and in all degrees : the authority of the king, of the tribal chief, of the "*paterfamilias*" on the three principal planes. Amongst backward peoples it impairs also the authority of the council of elders, which amongst them used to be of great weight and of divine right. The council of elders was a Senate in rags, and sometimes entirely naked, always venerated, always redoubtable. They impaired finally in the very heart of the home the authority of the husband, who before their arrival was well nigh almighty, and who now sees his power always restricted by their action. To all these authorities, these pillars of the social order, the French bring weakness and degradation, for this is unavoidable and necessary !

The change may go very deep ; children are released from their father's power, subjects from the power of the sultan, the young from the ancestral power of their elders, the wives from the power of their husbands ; in a greater or a less degree, sometimes very slightly, sometimes very strongly, but inevitably to a certain extent. And this is necessary. This is a transformation which must be wisely guided, controlled, limited and ended. It must be recognised, for it takes place always and everywhere. Machiavelli taught that when introducing anything new into a country conquered at the neighbours' expense, it was important to retain as far as possible the semblance of the old. If reform is necessary, it ought to be carried out after preparation and with due consideration, leaving the subject people under the illusion that their old traditions will be maintained, even if they are in fact being gradually, unobtrusively, progressively, modified—as is necessary. That seems to be sound psychology.

Lastly, *alteration* is the deliberate, premeditated act of introducing a change, at least a partial change, into the local usages ; of reforming without abolishing, in order to effect an improvement—or what is believed to be an improvement—in the established ways. This may best be achieved by inducing the native to take action, and freely, consciously and clearly to effect the change, thus conceived, in the traditional customs previously observed.

Thus by their teaching the French transform ceremonial ablution into the washing and cleansing of the body, so that the religious rite becomes a measure of hygiene, "after the manner of white men" as the black men say ; for under their system the purpose of ablution was not to cleanse the body, but to purify the soul before entering into communion with their god. The change consists in altering the custom a little, modifying the execution and procedure and . . . slightly emphasising the physical benefit. The alteration is a real reform. Without by any means abolishing the custom, you change this, you change that, you slightly stress some point, sometimes as in this case very slightly ; a little more water, or with a more generous supply available a lot more water, and ablution becomes washing in white man's fashion. The ritual act becomes a civil act, the spiritual becomes material.

Confirmation, degradation, alteration : these are not all. In every case there follow *innovation* or *invention* : in a word the introduction of usages unheard of by these peoples. It is no

longer something already present, already existing, already established, the bearings of which are being altered in the ruler's interest, it is something unknown which is being revealed, something strange which is being brought in : it is revolution, not transformation. The railway, the road, the canal, the ship, the aeroplane, the bank, the credit system. In recent times French dogmas and hopes, French dreams and discussions are introduced : this is innovation and revolution, something very radical, requiring separate detailed consideration.

Then there is the question of the *objects* aimed at, the effects sought, in making the transformation. What social facts are affected? What classes of human beings are affected by the change? The answer is : All social facts : all elements of common life. The forms of life are transformed : *religious* life, *juridical* life and, more obviously, *economic* life.

*Religious* life : conversion, change of dogma, change of ritual are effected insofar as success is met with in altering, sometimes permanently, the religion of the natives. Old and new are often blended. Conversion, which professes to substitute the new religion for the old, is frequently limited to transposing or modifying it.

*Juridical* life. The relations between kinsmen, between neighbours, between subject and chief, are all changed by the mere fact of contact between the two populations ; ancient traditions of law are shaken, altered, even abrogated by French action in the colonies.

Finally, *economic* life. Last but not least, implications and activities of a material nature are affected : work, trades and professions ; manufactures and supplies ; food, lodging and clothes ; amusement and entertainment—since for the French, art is one of the industries, and aesthetics one branch of economics—sport and games ; all these things, like all forms of work, undergo the shock of change.

In distinguishing between the adoption of a "cultural complex" and a "cultural trait", the Americans, basing their view on their own observations at home, expressly noted that the change brought about by the contact of two populations may in the second case be the simple adoption of one particular item, one "cultural trait", which makes no perceptible, profound or lasting impression on the people influenced. Thus the French make use of tobacco, chocolate, tea or coffee, particular tastes whose total effect, great though it may be, touches neither

mind nor heart. In the first case, on the other hand, when a whole "cultural complex" is transplanted, a coherent body of activities and institutions, it produces a profound mental and spiritual upheaval, there is then no distance, no dividing line between transformation and revolution ; but there is continuity, prolongation in the imperceptible migration to a new world.

## CHAPTER XLIX

### AGENTS OF TRANSFORMATION

There is one very noteworthy point in the transformation of the inhabitants of a colony by their contact with the conquerors. The *carriers* of change who receive, transmit and "diffuse" it, are the *subjects* themselves, those among them who are the more receptive, the more "sensitive" in the sense in which the photographer uses the word as he releases the shutter. These are the "evolved"; or, as I should prefer to call them, the frenchified, the advanced, the separated; those detached, as more or less they are, from the traditions of their country.

Let us first show what are the *conditions* of change which bring it about that in these countries some small number of the natives become detached from their traditions. Next, let us also note the *solutions* which the French in particular have found to this remarkable problem.

The *conditions* of change have two common characteristics. Change is *progressive*. It almost always comes, not startlingly nor suddenly, nor instantaneously, but gradually by stages, in fits and starts, with slowings down and stoppages and retreats, and it comes not as a whole for the entire country. The exception in the case I have spoken of where under French pressure the ruling sovereign has deliberately "modernised" the customary traditional system. A reforming king takes his subjects, or the majority of them, along with him. A hundred years ago in the Hawaiian Islands, known at that time as the Sandwich Islands—which saw the death of Captain Cook—the great "Emperor" Kamehameha, under the direct inspiration of Protestant missionaries, accepted Codes modelled on the West, and "anglicised" the institutions of the whole archipelago. Later, in the "Great Island" of Madagascar, King Radama II—before Ranalo—also under the influence of Protestant missionaries, modernised very extensively the institutions of the Hovas' country. This was a transformation *en bloc* amongst extremely "primitive" people. After 1870, the Zulu chief, Cetewayo, when defeated by the English, abruptly changed the system of the country, in accordance with their instructions. This was a total reform, carried through by the King's act and imposed on

his subjects. It was, however, according to report, a purely fictitious reform! Finally, in our own day, in the Annamite Empire, His Majesty Bao-Daï—who had lived more than ten years in Paris—taking his inspiration from French advice, brought up to date in many points the established system which had already been codified. He acted boldly but also with prudence.

These are nevertheless exceptional cases. The normal thing is progressive, not sudden, change; change which is gradual and partial, which proceeds in jerks, and at first affects certain of the natives only.

Being progressive, change will necessarily be *unequal*; sometimes greater, sometimes less, varying according to age, sex, rank and personalities within one group and one state.

According to *age*: for the old resist more bitterly; they are "protestants" as regards "progress" and all their mystic or magic power will be brought into play against the French. According to *sex*: for most often, though not always, it is the men who are more exposed to French influence. Nevertheless it happens in more than one country that the adoption of certain products or of certain fashions are primarily and mainly the woman's choice. According to *rank*: change is not equally marked amongst the higher and lower ranks. The more powerful and the better educated natives are more strongly tempted to frenchify themselves—though not always. Frequently certain novelties, especially of the material kind, are more easily introduced among the lower classes. Changes in the form of dress, of housing, of food, and of recreation, appeal more readily to the humbler, while it is the upper classes, more religious and more traditionally minded, who close their ranks against the penetration of outside things; theirs is the citadel which must finally be stormed. So we see that nothing is simple; but on the whole the fact remains that it is amongst the men-folk and the people of importance that the transformation which follows contact takes place earliest and most completely. According to *personalities*: amongst those who from their age, sex or rank might be expected to adapt themselves to the new order, amongst these prospective candidates for transformation, we find So-and-So, who is a die-hard resister. For amongst French "subjects" there is the *individual* with his disposition, his temperament, his taste for progress or regress, and we sometimes find, even amongst the primitive, certain individuals with a passion for anything



new, who from the first moment hurl themselves on the invention which the newcomers have revealed to them. From the very start, suddenly, in the twinkling of an eye, they become more convinced than their converters ! Some hundred years ago or so, there was in New Zealand a progressively minded man, Doua Terra, who as instructed by the English distributed seed to his relations, his friends and his neighbours for them to sow. Like Parmentier he was mocked and scorned, as tradition always dictates, even at home in France. But he obstinately persisted. He reaped his own harvest and his obvious success ended in his triumphing and winning over public opinion. He made a plan, for developing "values", building a town and changing the face of this new country. He was a "primitive" who was a reformer, who struggled singlehanded against his neighbours' errors, a carrier of progress in the teeth of inveterate routine ! He was an individual actively bidding defiance to the group.

Reforms may therefore be sought by such of the natives as have a leaning towards the new. By petitions and publications they demand changes and get them. It was native delegates to the Algerian Assemblies who requested French intervention to transform the habitat of the Algerian natives and pressed the point until they carried it. The same thing happened in regard to the status of the Kabyle woman. Certain changes imposed by a French decree of 1931 had been urgently demanded by the Kabyle delegates, the most "enlightened", the most frenchified, who pressed the colonial government to go ahead and considered it too slow in getting a move on !

All such native innovators, however, are opposed and repudiated by their tribe. You may call them "detribalised" men ; men who have lost or forgotten the conceptions and traditions of their tribe ; men who to a certain degree—be it more, be it less—have approximated to Frenchmen, and are no longer members of the tribe, without themselves wishing, and without the French wishing that they should be fully French ; they are not a hundred per cent. frenchified. The result is that their kinsmen, neighbours and friends no longer regard them as kinsmen, as neighbours or as friends ; for they have turned their backs on the customs of long ago. Their relations with their own family, with their tribe and with their town are on all three planes profoundly changed : the relations of father to son, of wife to husband, of neighbour to neighbour.

The father-to-son relation : These native reformers are often

students, quite young men, who under the influence of the schools—which multiply more and more but not sufficiently to satisfy the native demand when once the taste for education is aroused—have become changed and frenchified. The youth has changed while his parents and grandparents have not. A gulf has thus opened between father and son; the modern student has new needs and new ambitions, he is galled and then shocked by a parental authority which he feels weighs on him too heavily. Hence dissensions arise and escape is sought. In Algeria young men have been known to run away from home and seek the towns, to lose themselves there without return; uprooted youths, lost to their parents and their kin.

The wife-to-husband relation. Where it is the young husband who drinks in French teaching, while his wife remains detached at home, there will supervene a spiritual divorce; an opposition, becoming ever more profound, owing to French influence between the frenchified husband and the un-frenchified wife who still remains a prey to her superstitions. If, on the other hand, it is the wife who has been changed and converted to Christianity, being as a woman more susceptible than he to religious teaching, and if she has been christianised while her husband and parents have not, the conflict is severe. This has been known to occur amongst the Mossi of the Upper Niger. Now, according to their tradition, if a husband dies the wife must be married, by the *levirate*, to one of his brothers; but this is now against her faith and against her desire. Here is a drama such as the past never knew!

Neighbour-to-neighbour relation: Strain sets in when one of them is unaffected by the mental and spiritual upheaval that has overtaken the other. In the cities of India, when the Indians began to become rich as well as enlightened, when many of them became, as they nowadays frequently do, successful lawyers, doctors, and thriving merchants, it was an understood thing that the member of a family who grew wealthy should share with his relatives, for the family was one community. The man who by his own efforts had made money was harried by all his kinsfolk; serious conflicts used to ensue. It took a long time before the idea gained ground that the individual had a right to his own earnings.

Such being the concomitants of change, the various colonial empires have sought *solutions* to this peculiar problem of the “evolved”, as the French call them, those whom we might

call moral half-castes, social half-castes, though not racial hybrids. They remain pure-blooded "natives" with no trace of admixture, but their mind has been hybridised. Thanks to French influence, a cross-breeding of mentalities has taken place in their mind!

The French have had to take into consideration two points in particular: the *conception* of advanced persons and the *status* of advanced persons. What is the *conception* of them; who are they really? Can they be defined in legal terms? Can a distinction be drawn between natives in general and these receptive ones, these adapted, these frenchified ones—or these contaminated ones—to whom a special status must be assigned since they have forfeited their own? They are rejected, repudiated and put on the black list by the defenders of tradition; they thus lose their natural rights and become, as it were, outlaws. What *status* can they then be given, what rights can be granted them? In what matters, and up to what point can they advantageously be made independent of their relatives and neighbours, and given rights to suit their circumstances?

As to the *conception* of them: Who are they in law? Can they be defined by some decree? Are there no legal criteria of "advancement" which would give those duly qualified the right to a new status?

For this purpose two *tests* have in fact been suggested. First *conversion*. It was thought that the mere fact of having become a Christian was sufficient criterion of advancement. In that case all converts would have the right to be released from the old customary law, not perhaps the right to become French citizens, but at least the right to be no longer amenable to tribal tradition. The idea was that canon law, not French law, should apply to these converts and to all the baptised. You cannot venture to say that by conversion alone they have been frenchified. A Negro may be a Christian without being "assimilated" or "French-nationalised"; a man may change his god without changing his manners or his ways. That is one proposed solution, but not one that appeals to the legislator, whose constant aim is to unify and simplify the legal code of the day so as to favour the *territoriality* of private law.

A second *test* lays on the evolved person the onus of making his own application. This is more difficult and more uncertain. It demands not a written certificate of baptism, but a complex set of circumstances proving that the candidate has accepted the new state of affairs created by the conquerors, has "made

his approach " to French modes of thought by his tastes, needs, manners and customs such as can be verified by acts and gestures as specified by law.

French lawgivers have imagined that sometimes in particular cases they can find indications, sufficiently proving the advancement of a subject to justify according him special rights. This idea underlay the law of 1919 about the granting of French citizenship to native Algerians. This law gives them the right to acquire the status of a French citizen in certain *specified* cases, cases which presume that the native is already civilised, more civilised than his contemporary fellow-countrymen. These cases are : if he has fought for the French, or been an officer, or won a decoration or taken a degree ; these qualifications legally constitute a presumption that the applicant is looked on as more advanced, more frenchified than his average relative or his average neighbour. The same principle underlay the law of 1922 which reformed the recruitment for the Colonial Council of Cochin China. It enacted that all graduates should have the right to elect or to be elected to the Council. Various decrees of 1936 and 1937 for Indo-China and French Africa were framed on the same lines. Such are the indications of advancement already recognised, but in certain cases only, not in general. There is not, up to the present,<sup>1</sup> any general legislation covering the "evolved". It is particularly noteworthy that there is no unvarying definition, no precise public conception of an advanced person. The most that can be said is that, here and there only, some graduates, successful or wealthy persons, ex-officials and ex-soldiers are protected and privileged.

As regards the *status* of the advanced. When the judge is in practice able to decide that So-and-So is an " assimilated " person, in what way does this cut short the drama in which that person is involved ? In what respects and up to what point does he cease to be amenable to the old tribal law, in spite of French protestations, everywhere repeated, that they will uphold the ancient customary law of the natives ? In what respect are advanced persons *privileged* by laws valid for them alone ?

Two solutions are at present in operation—though we must remember that they operate only here and there, in special cases and in special places—in the colonial Empires, especially the French Empire. They are *separation* and *frenchification*.

Of the two, *separation* is in truth the simpler, the more direct

<sup>1</sup> [Viz. 1942. EOL]

. . . and the less expensive. It consists in deciding to set the more advanced persons apart from the rest of the tribe. Since people cannot live together if they are different, or at least too different, they must be separated, and this amounts to the same thing as releasing the more advanced individuals from tribal life, relieving them of a weight they find overwhelmingly oppressive.

A suggestion was made that they should be settled in separate villages where they could live as they liked. This experiment was tried as early as 1887 in the French Sudan. It was the idea of that great colonial statesman, Galliéni. These were "Liberty Villages" where converted Negroes and frenchified Negroes could settle if they wished—without being compelled to do so—to escape the tyrannies of native custom which increasingly galled and shocked them. The English have created a particular system applicable to native town-dwellers; this is another method of separating and releasing the more advanced.

In South Africa in 1927 the Governor was given the power to issue a "letter of exemption" permitting such and such a person to live in a reserved area. This permit is issued to a specified individual, not collectively, as in the Sudan in Galliéni's day. It can also be revoked if the person in question reverts—as is sometimes the case—to backward ways. This is provisional separation, revocable at will, separation for a period, not necessarily for always: its duration depending on the individual himself and on him alone.

Lastly, in the Belgian Congo these matters are governed by a system of legislation which merits attention. First, laws of 1923, 1931 and 1934 have set up, as the English have done, urban districts where the inhabitants are independent of their original tribal group: these towns are defined as "liberty areas" (*milieux de liberté*); and in rural districts places called "extra-customary centres" (*centres extra-coutumiers*) which, as their name implies, are no longer subject to customary law. In neighbourhoods where "evolved" persons, especially converts, are numerous, the Governor has power to found an extra-customary centre, whose inhabitants will be free from the jurisdiction of tribal law. Such a centre is to have a chief and a council elected from among the inhabitants; and it is also to have a budget which they are to establish and expend; finally, it is to have a protecting European committee composed of six missionaries and seven officials. This then is a group system, but on the other hand a system *sui generis*, not identical with the

system under which the White Men live : a middle system, or a system half-way between that of the Whites and that of their native subjects. This system comes into play by the formal entry of these civilised or less backward natives in a "register of the civilised population". In this register the names are recorded of all those who have freely adhered to the new ideas and new ways. Their children's names will as of right also be entered in this great album of the newly-civilised, and they will be free by the *jus sanguinis* from the old customary law.

*Frenchification* : This is of course another solution and a more far-reaching one, which confers French nationality on "evolved" individuals and consequently converts them into French citizens with the same rights as Frenchmen living in France. It goes further than the preceding solution. There is no longer question of uniformly setting the "evolved" free from their old tribal law, of moderately loosening the old grip of the tribe on its members ; it is a question of making Frenchmen of them—at least in the legal sense—of granting them the prerogatives of a real citizen and thus, by a courageous leap, assimilating them : still in the legal sense.

From now on, we must quote not laws already passed, but plans, in particular the plan of Monsieur Viollette. Under this scheme of his, a certain number of the most advanced Algerians, those most closely in sympathy with French thought and feeling, graduates and well-educated persons—some twenty thousand or so according to his estimate—would be by law declared to be French citizens without their consent being necessary. This would indeed be frenchification of the advanced, transformation of the "evolved", as they are called, into French citizens.

Meantime, even if this scheme is not adopted, native subjects of the French have the option of freely, voluntarily, requesting by a simple declaration, that French law should be applied to their agreements and transactions. Henceforward, almost everywhere, if they themselves are of the opinion that French law suits them better, they are free to follow it. This would itself be the indication that they are advanced, that they are in a legal sense frenchified, and in my opinion this may well prove the better solution. If of their own free will they give proof that they are frenchified, they have but to say one word or to complete one formality in order to have French civil law and not tribal tradition applied singly and specially to such and such an agreement or to such and such a transaction.

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## CHAPTER L

### INNOVATION

One last effect of social contact in the colonies is *innovation*, namely, the adoption or acceptance by the natives of new usages which did not exist in their country before the contact. Like transformation, innovation may be simple *acceptance* or complete *adoption*: sometimes the prolonged penetration of a whole complex or body of "traits" hitherto unknown. This means the *creation* of new habits by the native "subjects" of France.

As regards innovation we must note its *conditions*, its *degrees*, its *objects* and its *means*.

Its *conditions* are the circumstances which must be present in the colonies to make innovation possible. These circumstances are both methods and effects.

As to its methods: innovation may arise from *translation* or *formation*. Translation or diffusion occurs when the French—whether they wish to or not—make available to the natives of the colonies inventions which they have possessed and made use of for a longer or shorter time, but which had remained unknown overseas; inventions such as the aeroplane and the omnibus (first the horse-drawn omnibus and later the motor bus) and others, and when they transplant these things from the old country to the new. Here, it is *imitation* which promotes and spreads "progress". When new things are found in the colonies which did not exist in the old country, there may occur through the inventive use of them the formation of something which is an innovation for both parties and for two sets of people, for the *natives* and for the *French* themselves.

The *effects* of the innovation may also be different, according as it takes place through *substitution* or *introduction*.

We have *substitution* when a new fact, a new tool, a new dogma, is adopted by the natives in place of one which they previously employed. Christian converts, for instance, adopt new gods<sup>1</sup> instead and in place of their gods of old; they have changed their god; there has been merely a replacement; the

<sup>1</sup> [To the Protestant English ear this sounds odd, though it very probably represents the native's not unnatural interpretation of the Trinity and the Virgin Mother of God. (See p. 530 below.) EOL]

need, the function, the ideal, remain unchanged but with another background and supported by other authority.

On another plane, when the cart, the motor-car or the aeroplane come to replace older vehicles, they are substitutes only; the need of transport which had always existed is satisfied henceforth by more highly perfected instruments, the equivalent of which the native already possessed. When the trader's tawdry glass ornaments superseded the cut jewels of copper or silver, there was, as we know only too well, no artistic progress: a new adornment had merely ousted an older one.

Sometimes, however, a new object comes to meet a new need. In that case we have *introduction*. The need and the means of satisfying it are both new. The article and its function are simultaneously revealed to the native. Thus it was with alcohol and its ensuing drunkenness, for though the natives had stimulants of their own, they knew nothing of alcohol and they acquired a new vice at the same time as a new article. So too with watches and clocks, which are objects of adornment rather than of use to people who have no thought of time. The clock is rarely going; stopped clocks have long been a common sight in the houses of Moroccan notables—but nobody minds in the least! Similarly with forks, and articles connected with clothing, houses and food as well as with amusements. These things all come as revelations to the native, since they are articles unfamiliar to his past, things of which he had no need, and of whose existence he had no suspicion. Amongst many peoples, the same applies to domestic animals and beasts of burden; some were unacquainted with the dog, the mule, the donkey, and the horse, even with the camel and the elephant, and it was the European who taught them the need for these things and brought them the means of satisfying the new need.

There are *degrees* of innovation, too, which we should distinguish: two phases in particular: the *isolated borrowing* and the *composite borrowing*.

When one particular article alone is adopted separately and in isolation without the adoption of any other, we have *isolated borrowing*. Using the American terminology which we have already noted, we have here the introduction of such and such a "cultural trait", specially and by itself. Where the native was accustomed to go about bare-headed, he now puts on a hat; this is the introduction of one isolated trait. For people often take a fancy to a hat without coveting a waistcoat or a shoe!

In another place it may be the shoe they borrow and nothing else : or perhaps braces or sock-suspenders, or the umbrella, which like the parasol is an emblem of nobility, used as a token of social standing, not as a protection from rain or sun. The proof of this use is that it is never opened, and in the course of time it becomes rusted and bent, and refuses to open. On the lofty plateaux of Assam I saw the great popularity enjoyed amongst the Moïs by the safety-pin. Quite recently, I was told, a certain Moï got the idea that his blue waistband would be fastened better with an English pin, and would not need to be re-adjusted. All the Moïs whom I met amongst the tribes had hastened to adopt this tiny instrument : an English tool, brought to them by the French. The petrol tin has penetrated everywhere, and is put to uses never dreamt of by its inventors !

The isolated borrowing leads on to the *composite borrowing* or the introduction of a "culture complex", namely, a body of individual articles related to each other and co-ordinated with each other, necessary to and complementing each other. So much so, that to adopt some of them involves adopting the others also without question.

Amongst the more advanced or less backward peoples this is perhaps the more common phenomenon : the borrowing not of one article or one mannerism by itself, to ape "the White Man's way" as they say in the Sudan, but a whole set or body of mannerisms and articles which are taken over *en bloc* and in the lump. When the native builds a house instead of his *canha* or *gourbi* or tent—as in South Morocco and South Algeria he often does—he is not only adopting a new shelter device. For though the house is a housing device, it brings also a changed mode of life. In the course of time the house changes his ways of living and even of thinking ; the spiritual change marches in step with the material change ; the house makes the man, in more than one respect. The same principle holds good when still more complicated procedures are adopted which dominate community life. Currency, banks and credit, for instance, though they serve in the first instance as convenient means of interchanging goods and values, by making such transactions easier, they represent a new departure too important not to change the people's very modes of thought. Wherever currency, banks and credit have been introduced, they have in the course of time transformed the conceptions and traditions of the in-

habitants ; their whole mentality has been affected, sometimes suddenly, always profoundly.

There is thus a continuity between the isolated and the complex borrowing. When the Red Indians of America adopted the horse, which they had not known before, that was an isolated borrowing ; yet, after a hundred years, the entire " culture " of these peoples has inevitably changed as a result of the horse's having come amongst them. Their methods of transport, their methods of work, their methods of living have been transformed ; intercourse has sprung up between tribe and tribe ; confederations, leagues of nations, as they call them, have been formed amongst them, in particular the Iroquois Confederation, " the league of five nations ". This was the work of the Europeans, made possible by their gift to the Indians of the horse.

The complex borrowing has three aspects which must be distinguished : *speech, law and creed*.

The adoption in the French colonies of French *speech*, consequent on the teaching of the grammar and syntax of the language, is a composite fact which in time changes the native's mentality. For language is the instrument of thought. Men think with words, thought is language, and logical thought is influenced by the mere fact of substituting—though it were only partially and not completely—a new language for an old one. The adoption of a new speech is a spiritual phenomenon.

The borrowing of French Law, the adoption of the French legal system, has universally taken place in the French colonies, whether by French action or not, since it happens, not that all natives, but that certain natives, have quite spontaneously adopted French Law in its entirety as a body of laws. In that case it is no longer a question of making use, as they often do, of one special decree for the more convenient carrying out of one special transaction or operation, or the conclusion of one special contract ; it is a question of taking over *en bloc*, and as one whole, the entire body of French Law. This is a complex borrowing which very markedly transforms the conceptions, traditions and aspirations of the old inhabitants, for the mere fact of submitting or being submitted, by the power of the law, to the whole system of French Law is a change which dominates everything and shakes the whole social system.

The adoption of a new *creed*, or *conversion*, is not only a complex matter, but an infinitely complex one. The change of god is at once *abrogation, transformation and innovation*. It is abrogation

since the first step must be to renounce the old gods, to abolish the "false gods" and to overturn the old idols. A fact frequently unsuspected by the proselytising missions, it is also *transformation*: for it means adapting old ideas so as to create a religious syncretism. The old gods are not dead, as you might think; they often survive, clad in new raiment; they change their plumage and their outward semblance, but they still, discreetly or secretly, "hold the stage", taking cover behind a mask. This was true even in olden days, for does not Scripture speak in one passage of new wine poured into old bottles! It is *innovation* too, since conversion is the adoption of a new god and is most frequently a transition from polytheism to monotheism. It is on this plane that we can speak of formation and invention in the colonies as well as of translation. For though the new god is the God of the Christians, he is also not infrequently a composite of gods manufactured in the colonies who are not conquering gods. Mixed, conglomerate creeds are created in which saints and spirits, angels and jinns cohabit. The god Caodai of the Indo-Chinese is a reconstructed god, if not a newly manufactured god, created for an artificial cult that is a mosaic of fragments.

It is, I think, significant that converts as a rule change their name and are given a new name to mark their change of creed. This well expresses the fact that conversion is a most radical change of the converts' mental attitude, for here are accumulated and superimposed on each other all the effects of change which contact can bring about: abrogation, transformation, innovation; the abolition of the old gods, the adaptation of the old gods, the introduction of new gods; all these great combined phenomena are always present.

The *objects* or the effects of innovation may be summarily sketched. What matters are affected by innovation? What are the fashions, ideas, tastes, manners, laws, needs, which are "innovated"? What unheard-of thing can be invented in a new country? On what planes will inventions be displayed?

We shall not be surprised at the answer: *all* social matters without exception. *Words* and *arts* and *games* and *laws* and *dogmas* may all be transplanted, may all be invented. All these changes represent the native's conversion, acceptance or adoption of new needs and new means of satisfying those needs. For the moment let us refrain from enumerating, and define two types of objects which may be affected by innovation: there may be the introduction of *things* and there may be penetration of *ideas*.

Some little time ago I had the opportunity of studying in the dining saloon of a liner, a native from a "hot country" who from his complexion was obviously a hundred per cent pure-bred. He was helping himself to English sauce and was holding a very small booklet in his hand. Unobtrusively I contrived to read the title; it was Rousseau's *Social Contract* in French. This worthy fellow, who was reading as he ate, was simultaneously enjoying two different borrowings: one material, one mental. He had also changed his habits, for amongst Orientals eating is a sufficient occupation in itself: they neither read nor converse during a meal: when they eat, they eat. Innovation is both material and spiritual.

As for *material* innovation, objects or products are brought to the natives of which they knew nothing before their rulers came. Sometimes these objects are *new*, sometimes *old*: it is important, as we shall see, to be precise. Merchants despatch *new* objects to these countries in ever-increasing quantities; now, instruments, tools, machines, motor-cars, aeroplanes, hammers, pruning-shears, even mowing machines to cut the golf greens of rajahs and sultans; now, manufactured goods, products in the proper sense, prepared and made up for human use, what are in short known as "consumer goods", English sauce or marmalade, knickerbockers or white dinner-jackets, manufactured finished articles, new means of satisfying the new needs which the native has been taught. *Old* objects too are sent, second-hand things used and worn out—sometimes hopelessly worn out—which in the colonies blossom again like the dry twig of many a legend. Old tools, old clothes; the petrol tin (never new), which has found a thousand new uses; the old military tunic which finds a new lease of life in the colonies as a mark of distinction. In the middle of the Atlas Mountains I saw a shepherd wearing a coat, threadbare and green with age, which had in France seen better days! Old clocks, old omnibuses, old boots and shoes, old receptacles of every kind are "reconditioned"; and "flea-markets" flourish in the colonies. One man's refuse is another man's joy. This is a type of borrowing which should be looked into.

Innovation is more and more of the spiritual kind. Thus French manners, ideas, passions, aspirations and prejudices, French tastes, hatreds and loves are taken over by the natives, but often with a certain time-lag. In the spiritual as in the material sphere there are second-hand objects and second-hand

tools. Old pamphlets and forgotten books are translated in new countries and read in the colonies when they are no longer read at home ; outworn philosophies enjoy a second youth under these distant skies ! On the banks of the Seine, who now reads the *Social Contract* ? Yet it is now translated into Turkish, Arabic, Chinese, Malay and Quoc-ngu. Will it be translated into Moï one of these days ? Very possibly, for the Moï now possess an alphabet—or are just about to—invented for them by the French !

It will be the same, though it would be indiscreet to over-emphasise the point, with those Declarations of the Rights of the Citizen which are now it is only too true, out of fashion in France, but which, are—or were—the formula of French liberties and principles : they will flourish in tropical lands. It may well be that no reading is more popular in Tong-King and elsewhere than the 1789 Declaration of Rights ! And as for Constitutions . . . ! The Cuban Constitution devotes four pages to the liberties of the individual ! In other words innovation, like transformation, is a *transplanting* in two distinct senses : a transplanting in *space*, since an object, a dogma, a need, is transferred from here to over there, from temperate to tropical countries ; and a transplanting in *time*, since an object, a concept or a need which is outworn at home, out of date or out of fashion, which is no longer wanted, perhaps even no longer known, this outworn thing makes its way overseas, there to be reborn and rejuvenated ! The plant which in France is withered and faded, recaptures its verdure in a distant soil !

Now, turning to the *means* of innovation : its procedures, its instruments, the roads, if you will, along which it travels ; this is the last point we must take up. Let us realise that for the most part we do not know either at what moment, or through what agency, or by what means, any given instrument, or process, or manufactured article has penetrated into a new country. The inventor, or rather the introducer, the innovator, remains, as usual, unknown. Who was it amongst the savage, almost naked Moï who first used a safety-pin to fasten his dark blue waistband ? We do not know, and those who set out for distant countries should bear this vital fact in mind. I reckon four ways in which innovation might meet with its success : as a *gift*, as an article of *trade*, as the subject of a *lesson* or of a *decree*.

The *present*, the gift, with which explorations and penetrations begin, is a revelation to a primitive people of a new object, the indication of an unsuspected need, creating the desire for some-

thing convenient, easy and useful. It is primarily a gift which is the vehicle of that form of progress which is comfort.

Commerce too or *trade*, whether by *barter*, *sale* or *loan*, was an ancient, even a "prehistoric" way of making strange "goods" known to distant peoples. There have been preserved lists of the products which were bartered, bought, or borrowed, by the natives of the French colonies from traders, who were out to make profits not gifts. We know the articles which self-interested traders brought to Senegal and the Sudan during the course of two or three hundred years.

The *lesson* is provided by the teaching or the demonstration which the conquerors give in speaking to the natives of the advantages they would gain by adopting these new products. Then there is the seductive "propaganda" of the advertisement, the poster and the prospectus drawn up in the local vernacular, Arabic or Quoc-ngu as the case may be, just as at home "patent medicines" most successfully boost themselves. Then there is the "exhibition" too with its show-cases. In Algeria a train-exhibition allows the natives actually to see French instruments, manufactured goods and "novelties": offering them deliberate and calculated temptation which is no less potent amongst coloured than amongst white people. Further, there is the "demonstration", for the French send to these peoples advertising and publicity agents, known as "demonstrators", or touts, who harangue open-air audiences—not when a wind is blowing!—criers and singers, heralds of progress. Lastly, in matters of ideas and manners, there is education and preaching; teaching both in speech and writing about the gods, about the laws, about manners, tastes, ideals; teaching also by act and gesture, which serve as example and suggestion.

Lastly comes the *decree* to impose innovations on the native by the command or edict of the legislator, compelling him to "respect French laws". The force of law has two aspects, according as it is *open* and straightforward, or *indirect*. Open force of law is legal obligation announced and imposed with the sanction of French authority; the command, positive or negative, enjoining or forbidding, is openly published, by the beat not of drums, but of the tom-tom. *Indirect* or dissimulated force, disguised as mere pressure, is imposed not by law but by circumstance, since there are a thousand ways of inducing the natives by sheer weight, without their own wish, to adopt French *manners* and customs, products and manufactures. Thus there may be



either *command* or *pressure*. *Command* is exercised directly, openly and legally by the text of a law ; *pressure*, which is purely incitement, is exerted by discreet methods and secret ways, operating through fear or holding out hope of profit, even to the length of promising decorations and distinctions !

Thus, the great unity of modern empires is extended by innovation. The inhabitants of these distant countries, tens of millions, or it may be hundreds of millions, have had to see their ancient customs abolished, have had to change and adapt their ancient ways in order to live on good terms with their rulers ; lastly, and more than all, they have had to see the display of new inventions which do not always bring them either pleasure or advantage.

If to-day throughout the immense English Empire, which is primarily based on one common cult, so many millions of individuals drink tea—as indeed they do also in Morocco, where it was the English who introduced it—and if they all wear clothes, and if many of them are out-and-out Puritans,<sup>1</sup> this is proof, beyond any shadow of doubt, that expansion spells diffusion.

We have even seen—Stendhal commented on it a hundred years ago about Algeria—inventions come to birth in the colonies which had not been known in the mother-country ; the colonies which in many things have been the followers, have in some things led the way. Certain ideas of comfort and of progress come to us from the colonies. The new countries have been able to teach the old countries ; thus the unity of the great Empires is woven of warp and woof.

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<sup>1</sup> [This picture of the British Empire will entertain the British reader. EOL]

## CHAPTER LI

### RETURN SHOCK

While the effects of colonial contact—abolition, transformation, innovation—are in the first place those of the rulers on the ruled, of the French on the Native, there are also effects operating in the reverse direction, of the Native on the French. In the course of time a change comes over the rulers from the fact of their contact with the ruled. There is, as I have said, imitation “from below upwards” and at the same time “from above downwards”.

There thus arises, and it occurred also in ancient times, a sort of reversed conversion : the conversion of the conqueror by the conquered, and that notwithstanding the great contempt which in olden days the victor professed to feel for the defeated. This sufficiently emphasises the truth that there has always been, and always is, an inevitable, irresistible, inescapable influence exercised on the conquerors, who are “contaminated” or “infected” by their relations with the foreigner.

Herodotus amongst the Greeks, and amongst the Romans Juvenal, were fully alive to this ; and they complained that the rulers, in the one case the Greeks, in the other the Romans, were apt to borrow the fashions of their “subjects”. One philosopher has contended that the imitation of one people by another should be absolutely forbidden, that the ruling masters ought always to be on their guard not to be contaminated by subject peoples.

Let us get a clear *notion* and definition of this central fact. We need only to recall and reverse the exact observations we have made of the inferior's imitation of those above him. We have the same data, the same ways, the same means, the same phases, the same distinction between reception and adoption, mere reception and full adoption. Sometimes there is simple *reception* only, the borrowing of this or that “culture trait”, separately, in isolation : putting on native slippers, wearing a *burnous* or smoking tobacco. Sometimes there is full *adoption*, carrying with it much more : being permanently and profoundly influenced by the conceptions and traditions of the people governed, acquiring a taste for their institutions, falling madly

in love—as has been known to happen—with the manners and customs of these distant peoples. When this stage of full adoption and impregnation is reached, we might speak not as in the opposite case we did of a detribalised native, but of a decivilised or de-frenchified Frenchman, of a white man who has gone black in soul and spirit.

In this sphere we must turn to the Americans, who have made a methodical study of this reaction ; they are worried by the “Negro complex” developed by some white citizens. Great as their contempt for their black fellow-countrymen—and this contempt is well known—they have adopted Negro fashions ; they even dance Negro dances, and so doing they cannot help having somewhat blackened themselves. A Freudian psychiatrist who has lived for a considerable time in the U.S.A. has made a study of the influence exercised on the Whites by the Blacks. To almost exactly the same extent, the same effects and the same phenomena have been found active in both directions, from White to Black from Black to White.

Let us take the *subjects* in which the superior is influenced by the inferior, in which White imitates Black. We must first consider whether this imitation is generally local or partial, and not global or total. The Whites certainly do not as a rule adopt and accept the ways of Yellows or Blacks all at once or *en bloc*. It is not a question of ten million to thirty million Whites—which is their number in tropical countries—unanimously and simultaneously adopting local customs, but there are always, or very nearly always, some amongst them, the more adaptable, the more susceptible, the more easily permeable let us say, who do so. It depends in the first place on *sex*, but also on *age* : for on the whole those who emigrate are the young rather than the old. The womenfolk are more open to the temptation to follow local customs in matters of clothes, housing and food ; the ancestral ways of one people becoming for a moment the fashion of another ! It is the women who on the beaches of France have introduced the *pareo* of Tahiti or the sarong of Bornéo or Java. It was the *Musée de l'Homme* which launched the fashion through the mannequins of the great dress designers. Women have also been converted to the creeds and cults of the subject peoples, not of course to primitive fetishism but to Islam, to Buddhism and to many another *ism*. You can see Gandhi, the prophet, everywhere accompanied by the young Englishwoman Madeline Slade, an officer's daughter who has betaken herself to Buddha and the

Mahatma. Men, however, are also liable to be affected. It is mainly *men* too, as accident or opportunity has dictated, sailors, soldiers, traders, colonists, who have let themselves be initiated, and have been tempted to renounce their past and to "decivilise" themselves, bidding a complete farewell to "the White Man's ways". In this connection we think at once of the old Frenchman Dupuis-Yacouba who settled permanently in Timbuctoo and who, having turned Muslim, lived after the fashion of a local patriarch with his wives and children in his large house. Nowadays he is called Yacouba—and the name of Jacob suits him well!

Such is the usual way when we are faced by one individual case; one isolated person is contaminated, more or less intimately, more or less profoundly.

Then there are the *degrees* of imitation, always two of them, as I have said, the single and the complex borrowing.

The *single* borrowing is the borrowing of one "culture trait" by itself: an item of diet like the *couscous*; an article of clothing, the *burnous* for instance; an instrument such as the perfume-brazier; a luxury like the carpet. The colonists of the Maghrib have taken to using the native hoe instead of the Piedmont pick, for though it is a primitive and less efficient tool, it is better suited to the sterile soil. At one time French ladies took to wearing toe-rings or adorned themselves with an amulet jewel known as "Fatima's hand", which was quite meaningless when transplanted to France.

The *complex* borrowing, or global borrowing, occurs when the White immigrant has imbibed or steeped himself in the whole "culture complex" of the country. He surrenders himself little by little, a victim of the climate, seduced by his surroundings; he abandons himself to complete forgetfulness of the habits of his youth. He becomes a native; he lives like the natives and amongst them. This transformation reaches a point at which legal hair-splitters—who always enjoy asking questions—ask whether it would not be better to decide that such persons have become natives in the legal sense, since after a long descent they have come to share the native mentality. The answer is "No". A Frenchman may become a native in fact, but not in law; a ruler cannot become a subject even if he lives, as sometimes happens, completely, perfectly and absolutely in native fashion even to going about naked or in rags—in this case caricature is near!—like Rimbaud or Gauguin. Witness to such a state of mind is borne by Rimbaud's letters (the poet in Rimbaud died

too young, he then became the adventurer living in Harar<sup>1</sup>), and by Gauguin's letters. The painter lived in Tahiti, not without causing daily headaches to the Governor. These men, and others too, many others both before and after them, evoked for themselves in madness and fury the ideal of an anti-Western life and thus turned themselves into moral inverters.

Though there are, both in practice and in law, very great obstacles to contagion, and though it is not easy for civilised men to become non-civilised or semi-civilised, and though the process takes a very long time, yet there are cases where a person has arrived at an almost complete and perfect result. In olden days navigators sometimes found sailors marooned on far-off islands who had become a hundred per cent savage, who were not to be distinguished from their native companions and who had forgotten their own language. When their friends offered to take them home, they refused, and remained with the tribe !

What are the *objects* or the effects of this imitation of the native by his rulers? What have we taken from the inhabitants of these overseas countries, what have they given us, and what have they sometimes bequeathed to us when they have themselves disappeared? Western man has learnt much from the native, and more than once learnt something valuable; he has gained as much as he has lost. Sir James Frazer has enumerated the gifts which for centuries the coloured peoples have been giving us. The National Museum of Ottawa has devoted an entire hall to an Exhibition of what less-civilised man has conferred on his more-civilised White brother.

As always, these acquisitions are both material and spiritual in combination: products and manners and customs, things, gestures, ideas. First and chiefly, numerous products: most frequently these products are first met by the Western immigrant in the distant country and there adopted by the colonist; far less often they are imported by native immigrants to the West, and their acquaintance made in Europe. Thus the introduction of very many products which the "non-civilised" has taught the civilised to use has been effected now in their country now in ours, but more frequently in their country and less often in ours.

Amongst these products are cocoa and coffee; tobacco, the cigar and the pipe; rubber, which the natives discovered long before us; condiments and spices, the clove and the nutmeg; the turkey whose French name *dindon* recalls its Indian origin; articles

<sup>1</sup> [See note 2, p. 447 above. EOL]

of food, and medicines. Jacques Cartier, the discoverer of Canada, took medicine from the hands of savages : we owe to them julep, ipecacuanha, rhubarb, Peruvian balsam and many other drugs. We are often ignorant of the exact spot from which they came, but we at least know that they came to us from these countries overseas. We owe them too various kinds of food, cassava for one, and most probably the potato. And we owe them amusements, dances and games, both from ancient and quite modern times.

To sum up, our chief debt to colonised countries during the last three centuries has been drugs and pleasures : three drugs in particular and three pleasures too, since we must be drastically brief. The three chief drugs are opium, quinine and cola and the three chief pleasures, tobacco, cocoa and coffee. " Nothing but superfluities," some worthy folk might say ; true, but superfluities which have become . . . necessities ! In detail, our gains have been infinite. Couscous and curry come from India and Ceylon, and punch may well be from India too ; in the way of clothing, woven shawls were imported into the West by Marco Polo before 1300. We also owe articles like the hammock, which probably comes from the Red men of the Caribbæan, and the boat of bark or the canoe ; and such animals as the camel and the zebu which the French were the first Westerners to domesticate. It is not impossible that our taste for " Zoos " may have arisen in imitation of those Far Eastern sovereigns, or even kinglets, who always kept menageries as a matter of prestige. They do so still, and you may still see menageries in Indonesia and Malaya.

Apart from material products, various *fashions* have come to Europe from native sources : practical usages, legal customs ; conceptions, inventions, manners, procedures, formulas, recipes, which have met with success, sometimes sudden success, from their convenience or usefulness. Ways of working, forms of speech, types of games ; rules of law, rites of worship : all these are various aspects of fashions which the White Man has learnt in far-off lands.

Ways of *work* ; arts, crafts and industries and all the exoticism of private life have penetrated into old Europe from the Far East and the Far West. The cultivation of maize was first introduced into Spain from America in the 16th century, to improve nutrition amongst the less advanced European countries.

Forms of *speech* : words and phrases have come into our languages from intercourse with natives. Amongst many words

the French use, whether in so-called slang or in everyday middle-class speech, very many—more by far than might be thought—are importations from distant lands. The Supplement to Littré's Dictionary listed French words derived from Arabic. The Arabic scholar Devic had there been able to show—though his list made no claim to completeness—that a very large number of French words are of Arab origin, many dating back to early borrowings. It is certain that to-day the penetration of Maghrib-Arab words into French, especially into slang, is even more marked. When the Frenchman says *macache* (*not likely!*) or *maboul* (*crazy*) he is talking Arabic without suspecting it; just as when he speaks of an *ouragan* (*hurricane*) or a *savane* (*savannah*) he is talking Iroquois, without suspecting that either! An English scholar has enumerated words from Australia and the Pacific Islands, words of primitive and ultra-primitive peoples which are current both in English and American. The chief reason for these borrowings is that the word is adopted with the article concerned. When you put on a *pareo* you use the name *pareo* and you call a "pareo" a *pareo* just as you call a cat a cat.

Varieties of *game*: entertainments, amusements and diversions often come, as we know, from distant parts. This applies particularly to tales and stories, for many Western tales have come to us from the East. The very Fables of good old La Fontaine contain many ancient Oriental tales. Dances are often foreign too, especially Negro dances. Mimes and charades, comedies and tragedies, or the embryo forms of them, have often come, openly or furtively, from overseas. Songs, religious and profane chants, American or African, are sung in France though they are in error known as "Creole songs". They are certainly exotic songs, but they are aboriginal not Creole, for the Creoles were *Europeans* settled in the West Indies whose children were born out there. Sports and games have played their part from very early days. The English to-day say that their polo came to them from India. This, as may be imagined, gives them no pleasure; yet they have written several large books to prove that polo, this distinguished game of the Saxon "gentleman", was a gift to them from their Indian subjects.<sup>1</sup>

<sup>1</sup> [We may fairly question whether any English "gentleman" would be disturbed even if he thought that polo was an Indian game! It would seem to have originated in Tibet and thence reached Gilgit and Chitral, where the humblest peasant in the humblest village still plays it as of course. In modern times it was introduced into India in 1863 by Maj.-Gen. Sherar, who brought two teams of Manipuri natives to play an exhibition match in Calcutta. In 1869 the 10th Hussars brought it to England. *Ency. Brit.*, 14th Ed., s.v. *polo*. EOL]

The borrowing of Rules of *law*. This was a ricochet not expected by French legislators. In Algeria and in Libya, French and Italian colonists have been known to use the traditional native procedures for regulating the cultivation of the soil. The chief of these is a joint leasing, or as we might say a lease-partnership, between the owner and the tiller of the soil, an arrangement which in the Maghrib is known as *mugharsa*. They also sometimes take advantage of the religious device known as mort main, by making use of the *waqf* or *habus* which are a sort of perpetual endowment, making landed property inalienable. These are akin to the *majorats* which used to exist in French Law. The aim of these devices is to secure this property to a city, a tribe, a family, or for the benefit of a mosque. We remember that a great French philosopher, Auguste Comte, adopted the principle of the Islamic tithe.<sup>1</sup> All his life to mark the admiration which he professed for Muhammad, he dedicated a tenth of his earnings to charity. This was imitation, on the legal plane, prompted by idealism and affection.

The adoption from semi-civilised or non-civilised subjects of *rites* of worship was a phenomenon familiar to the Greeks and Romans. At all periods the conquering people have tended to borrow from the conquered their cults and their gods; they have felt it necessary always to enlist the support of the local deities. As the Greeks and the Romans worshipped Mithra along with Adonis and with Attis, the old Syrian gods, so the modern Romans—I mean the English and also the French—become on occasion Buddhists or Muslims. In England and America there are Buddhist churches. Now, we know full well how largely these new-fangled cults, which have sprung up both there and in France, Theosophy and Christian Science and many others, are cults of Oriental origin. They are exotic forms of worship, always transposed, always distorted. The recent spread of Theosophy in Anglo-Saxon countries, and even in France, sudden as it sometimes is, striking as it always is, is in itself the transplantation of a foreign worship. Conversions to Islam which have taken place amongst Frenchmen, have not been acts of uncultured minds; they are the result of deliberate thought and intention. It is in America, as it seems to me, that religious syncretism has taken place, a fusion and confusion of

<sup>1</sup> [The idea that a tenth or tithe of a man's wealth should be "holy unto the Lord" is one of the many principles which Muhammad lifted from the Old Testament. See Leviticus xxvii. 30-2. EOL]



Western and Oriental spirits and gods in a new cult. Many societies and many institutions in America, even official ones, have rules and rites inspired by ancient Red Indian traditions. This is the case with their political parties and their sects, especially Tammany Hall which was founded in 1788 and is the root and centre of the Democratic Party. Tammany Hall has regulations, characteristics, rites and titles borrowed from the Red Indians. The chiefs are *sachems*, and the whole organisation, from top to bottom, is made to match, with solemn and appropriate names and gestures. In more recent times the same holds good for the rampant organisation Ku Klux Klan with its ritual and demonstrations in Redskin taste. Even the Boy Scout movement in England is not wholly innocent of similar features.

Now let us turn to the *means* or the instruments by which the subject peoples influence their rulers to imitate. We are no longer seeking to consider *who* are the imitators, nor to what *point* imitation proceeds, nor what are the *objects* imitated, but *how*, by what means, and in what ways, imitation occurs.

In this case, as in the converse case, we must distinguish two procedures in particular : *obligation* and *acceptance*.

*Obligation.* Amongst the Ancients, the adoption of their subjects' manners and customs was sometimes forced on them ; for all their pride, the conquerors suffered constraint. The French themselves, when they were in the penetration stage only of their arrival in these distant lands, were at first legally subject to constraint under the customs of the country. They were obliged to pay taxes, to give presents, to offer tributes (known as "customs") ; and when desirous of winning the support of a chief, or perhaps a king, they were compelled according to the practices of the country to submit to ceremonies, which it was impossible to avoid, repugnant or disgusting as these often were.<sup>1</sup> Even at the present day, tolerance or courtesy, convenience or practical advantage, often make it advisable to follow the accepted local usage in order to placate the people or to spare their feelings.

When the rulers indulge in imitation of their own free will, this is an act of *acceptance*. It must of course be understood that the persons involved do not always feel, conceive, think or realise that they are exercising their will in the matter. The very important step is taken by no means always consciously, but very often unconsciously. That is why I have spoken of impreg-

<sup>1</sup> Compare Richard Burton's painful experiences at the Court of Dahomey. EOL]

nation, of contagion and even of contamination. The decivilised person who in the course of time comes, almost without being aware, to abandoning his own ways in order to adopt native ways, is not conscious of what he has done, or only very slightly conscious of it. We are entitled to speak, as people do, and rightly do, of his being depressed and just letting himself go. It is a gentle gradual slope down which he has glided from a civilised to an uncivilised mode of life, with no obvious milestones marking the route.

In the most striking, typical cases—such as Chateaubriand's *René* has made famous—we may fairly speak, even in our own day, of a sort of homesickness for the savage state, the attraction of a natural simple life, or of an "appeal" by which the civilised man is unconsciously won over and which in time will gradually carry him off his feet. In his fine book, *The Plumed Serpent*, D. H. Lawrence has given tragic expression to such a case. The attraction is mysterious and complex, and you may search in vain for clear and rational elements in it: laziness assuredly is one, others assuredly are licence, revenge, illusion . . . But there remains an element of inexplicable impulse, an obscure urge—which we must leave in its obscurity!

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## BOOK IX

# CONFLICTS OF PROGRESS

### CHAPTER LII

#### "CONFLICT OF LAWS"

Amongst the conflicts which result from the contact of peoples in the colonies the conflict between two systems of law demands particular examination. We want to see how the *groups* existing in the colonies can adapt themselves to the *Colonial State* which the French have there set up. This enquiry forms the subject of the following chapters.

The legal aspect of the relation between the two peoples is what the jurists know as the "conflict of laws". Colonisation, having inevitably brought two social groups, or two societies, into contact, has also brought into contact legal rules, statutes or "norms" as they are often called.

Two social systems are joined, and consequently two legal systems or two bodies of law : that of the rulers and that of the ruled. The old system and the new system are going to conflict. The drama has two phases : *opposition* and *adaptation*.

At first sight the opposition is startling ; the two legal systems which confront each other are utterly different. They are sundered by three characteristics in particular.

The old law is *oral law* ; the new is *written law*. The old law is traditional and customary, begotten of the ancestors, transmitted by word of mouth. The new law is statutory and constitutional, preserved in print, modified by decree. The conflict therefore is one of the spoken versus the written word, tradition versus invention, the Past versus the Present.

The old law is *sacred* ; the new is *secular*. The old law is moulded by traditions, established by the gods ; its rules are as much rites of worship as norms of law. Religion, always the inspiration of tradition, is the very foundation of customary law. The new law is a layman's law, irreligious or—to be accurate—non-religious, a-religious. French codes of law bear no relation to the religions of France ; French civil law is independent of

canon law. This is the greatest obstacle to the approximation of the two bodies of law, and the one most difficult to overcome.

The old law is *local law*, special, tribal law; the new is *common law*, general, national law. Since the old law is oral and sacred, it is necessarily peculiar to a tribe, a family, a village, a church or a sect. In these overseas lands there exists no law common to the country considered as a whole, no law valid for everyone, governing everyone, whether he be Christian, Israelite, Musulman, idolater, animist or fetish-worshipper; the people have not the remotest conception of such a law. Each of them recognises the tribal law of his own particular tribe, the customary and traditional law passed down from one generation to another by word of mouth for this one tribe alone. The law therefore differs from tribe to tribe and secondarily from church to church, from sect to sect. Such and such a statute belongs to this *place*; such and such a statute belongs to this *god*. Such is the state of affairs which the French have found in their colonial territories.

Now, the new law is *territorial, national*. For what do the French do from the first moment of their arrival? They establish—as they feel they must—one uniform law for the whole colony, conveyed in written regulations, laws and decrees applying equally to every man without regard to his kindred or to his religion; and then after a very short space of time they speak of Algerian Law, Tunisian Law, Moroccan Law. Nowadays they speak of an Aofian Law,<sup>1</sup> whereby they mean a common statute for this whole large country, regulating not only public but also private law. There is one similar common law for all; not, as of old, one law for kinsmen, one for neighbours, one for believers, but one law laid down for all dwellers in the land, for all the Algerians, all the Moroccans, all the Tunisians, all the Aofians without distinction, a law whose scope (*ressort*) or jurisdiction covers territories far more extensive than the mother-country. Is there not an Indo-Chinese Law too? It is not speaking too strongly to say that a Legal Revolution has taken place!

Such in concrete terms is the conflict. To throw light on it first in general terms, let us consider what are the *solutions* that have been sought in order to allay the conflict, and what the *conceptions* which underlie and inspire these solutions.

In the course of time two *solutions* were tried, which we saw

<sup>1</sup> [I.e. Law of French West Africa, *Afrique occidentale française*, AOF. EOL]

taking on a new lease of life under the Italians in Ethiopia : on the one hand the *disjunction*, and on the other the *absorption*, of the two legal systems.

First the attempt was made, or dreamed of, to *disjoin*, to separate completely as it were by a moat, the deeper the better, the two systems. There would be one law for the newcomers, another law for the original inhabitants ; one law for the rulers, another for the ruled ; one law for the French, another for the Natives, with no relation of any kind between the two laws. If this state of affairs could be maintained, there would be no opposition between them ; *disjunction* would have forestalled conflict. Each group would independently have had its own powers and its own duties.

This was what the Jesuit priests had done long ago in Paraguay and Peru when they formed what they called "reductions" which we nowadays call "reserves" : Indian villages under the authority of the Jesuit Fathers. The Jesuits created a special body of law for these Indians, applying to them and to them only. Spaniards were forbidden—and this prohibition was as far as possible enforced—to enter the Indian reserves. There were thus two legal systems : Spanish law for the Spaniards, and Jesuit-made Indian law for the Indians, and for them alone.

This is what is also being done in South Africa, in certain quarters at least, where the Blacks have been segregated, as we have seen, from the Whites. The Blacks are parked in territories reserved for them, into which no White Man is allowed to penetrate. In precisely the same way, South Africa has established a National Park for the wild animals it wants to save from destruction ! In the Union of South Africa it is called Kruger Park ; in the Belgian Congo, Parc Albert. One law exists for the Whites, particularly in the cities where the intrusion of the Blacks is as far as possible prevented ; another law for the Blacks in the heart of their reserves, which are situated at a distance from the White Man's towns, and into which the White Man has no right to go.

The second solution is an attempt to *absorb* the one system into the other, though not completely or perfectly. For a state of complete separation can very rarely be preserved. Much more often there is communication between Black and White ; practical and legal relationships arise, especially where contracts are made between rulers and ruled ; then opposition at once springs up. The rulers tried two methods : to eliminate the

new law or to eliminate the old ; to place the French under native law, or the Native under French law : to allow the one law to absorb or supersede the other in whichever direction.

Surprising as it may seem, the first experiment sometimes tried, often dreamed of, was to let native law supersede French law, the oral law override the written law, religious law replace layman's law ! In the beginning the Whites accepted the current system of the country readily enough, often adjusting themselves to local custom from a taste for novelty. Jean de Léry, an explorer of olden days, reports that when the Normans spent some time amongst the Topinambou of South America they took to eating human flesh ; they turned cannibal—perhaps because they were short of meat ! The buccaneer and filibuster, the type of adventurer who was often the earliest colonist, was not wont to be fastidious ; he was ready for anything. He felt himself outside the King's jurisdiction since he had "crossed the Line" and was now in the Tropics, and his eyes had seen new skies ! Even down to our own day, explorers and pioneers are always tempted, and always inclined, to abandon their own customs in favour of those of the poor natives. The French have had to face the question, of whether a French immigrant has the right to change his law, to give up French law and obey the local law, and—especially in North Africa—to subject himself to Muslim law by becoming a convert to Islam. Some Frenchmen in Algeria, both in old and recent times, have imagined that by becoming a Musulman a man could free himself from the jurisdiction of French law and adopt the Quran and the Traditions as his legal guide. The French courts in Algeria have again and again been compelled to assert that it is impossible for a Frenchman of his own free will to put himself outside the scope of French law, and that a Frenchman in the colonies remains a Frenchman, subject to the law of France. To renounce his own religion and adopt a native religion, in particular to become a Musulman, is not sufficient to set him free—the word is apposite—from French law. The man born a Frenchman remains a Frenchman even in the colonies.

On the other hand, there have been Netherlanders who advised Europeans to follow Indonesian law. M. D. Hinloopen Labberton, the author of a linguistic index of Indonesian law, was of this opinion. He was, however, almost alone in holding it. Amongst the English, some have been of the opinion that

Europeans might well be made, partially at least, amenable to ancient native customary law. In 1834 the historian Macaulay published a whole scheme of *common justice* applicable equally to English and to Indians. This was to be administered by Courts which were to apply, to some extent at least, the law of the country even to the English. If this scheme was not adopted, a decree of 1836 at least made it in part applicable in civil cases. So we see in India the local *civil* law imposed on the English, as we later see the Orders in Council of 1872 and 1884 applying the Indian Penal Code to the English in certain regions. The English reserved to themselves the right to be tried by a European jury.<sup>1</sup> These facts clearly show that there is nothing abnormal in the suggestion of applying the law of the ruled to the new rulers! At the very beginning of the French occupation of Algeria, a judgment of the Court of Algiers laid it down that a Frenchwoman married to a Native was herself a native and amenable to native law. So there was one way—for at least one sex!—to shake off French law by contracting marriage with an Algerian. Jurisprudence however immediately changed; the Algerian Courts decided that a Frenchwoman, even when married to a Native, remained French and therefore amenable to French law: a ruling whose application encounters many difficulties.

When absorption took place, however, it did so more normally in the reverse direction. It was usually the old law which was submerged by the new, the oral law which yielded to the written law. The belief is that the *conjunction* of the two bodies of law has been brought about. The claim that this is so, is firmly upheld when converts to Christianity are in question. The natives of these countries are then subjected to French law, not directly—barring many exceptions, that is not attempted—but indirectly, because the native is "a convert to our faith" and it is held that religion, as in the time of the French kings, carries legislation with it. The baptised Native ought, it is felt, to renounce his own law, and obey either French law or canon law, or some special law: these are the three alternatives. The native convert has drawn closer to the French by adhering

<sup>1</sup> [The English student would be wise to consult the *Encyclopædia Britannica*, 14th Ed., s.v. *Indian Law*, on this subject. There never was, of course, a "law of the country".

The British recognised Hindu Law, Muhammadan Law and Burmese Buddhist Law in addition to Anglo-Indian Law. Whichever law applied to any given case, their great principle held good: that all men were equal before the Law: regardless of race, rank, creed, caste or colour. EOL]



to the White Man's religion ; the mere fact that he has been baptised has frenchified him ; he has deliberately separated himself from his fellows by accepting the faith of Christ, he must be supposed to have implicitly opted for a new law. But what new law ? It is sometimes claimed that his option was for French law. A convert being *de facto* frenchified, he must also be frenchified *de jure*, French law must at once be applied to him without its being necessary for him expressly to declare his adherence to French law ; or to state that he had opted—option is the word used—in favour of French law. Richelieu founded the Company of the Hundred Partners<sup>1</sup> and the Company's Charter of 1627 expressly laid down that all converts were to be subject to the King's law : one faith, one law, one king.

Times have changed, and in the modern secular French state another solution, to which I have elsewhere alluded, has been proposed. This would place the native convert under *Canon law* ; Canon law is the Christian law and he is now a Christian. The old Canon law is no longer in force amongst Frenchmen : it remains in force for French Roman Catholics since it is the law of the great Church of Rome, though French Protestants do not recognise it.

This solution was, as we know, not adopted. The jurists object that it runs counter to the French principle of *unity* in legislation. More logically, more tolerantly—so it seems to me—the tendency now is to adopt a solution already accepted, as I have pointed out, in certain other countries : namely to apply a *special law* to the converted, a law *sui generis*, intermediate and transitional between the old and the new.

This Special Law is a conciliatory compromise. It has been introduced by the English in East Africa. The convert adopts without restriction and with a minimum of effort, sometimes even suddenly and with fascinated enthusiasm, new tastes, new manners and consequently new laws. Natives of East Africa have been known spontaneously to demand monogamy instead of polygamy. They asked at the same time that at the change-over, if they had several wives, they might be allowed to choose from amongst them which they would prefer to keep ! The transition from old to new concepts is easy though not instantaneous. If the African native is prepared lightly to abandon polygamy his reason is a practical, material one. In olden days, polygamy provided the head of the household with a labour

<sup>1</sup> *La Compagnie des Cent associés.*

force. Less and less is this now the case ; polygamy no longer "pays", it has become a burden, not an asset. In the Negro countries, for instance in the French Sudan, it is very easy, without argument or strife, to induce the native to give up his own ways and partially at least to follow French laws, to adopt a Special Law, akin to French law, holding a position intermediate between the two systems.

If these solutions could be accepted, there would be no clear-cut opposition between the old and the modern law ; we should see either the new law superseded by the old, the White Man's code yielding to the Native's, or we should more probably see the new law advantageously superseding the old. In abandoning their own customs, partially though not wholly, in favour of French ones, the natives have from a legal point of view become frenchified ; more often reluctantly than gladly. That is why these solutions have proved ineffective. In the colonies, opposition has arisen in the legal sphere between rulers and ruled : a struggle of the Past against the Present, a resistance to the changes which we account Progress.

These solutions, however, are the result of underlying *conceptions* which inspire them, whether we realise it or not. For in the last resort the conflict is one of ideas, of metaphysics, or of what Alfred Tarry called "paraphysics".

We Europeans in the colonies, acting as rulers, have had, and still have, three conceptions of the attitude that we should take up to the customs of the local populations : *recognition*, *condescension* and *intolerance*.

*Recognition* implies accepting and adopting local customs and applying them without question, without contempt, disgust or disparagement, placing them in fact on a footing of complete equality with French customs and rules. This was presumably the attitude of mind of the many French writers who have proposed that instead of frenchifying native law it should be made to apply to the French rulers themselves. In the same spirit the Dutch accept fully and unreservedly the customary law of the country, the *Adatrecht* as they call it, and treat it on an equality with their own laws and decrees. They claim that in the Netherlands East Indies Dutch law and the *Adatrecht* are two systems of law of equal legal validity. If a conflict were to arise between the two systems, it would consequently be a conflict of laws in the international sense, and such a conflict would have to be resolved, as it would in Europe, between

nation and nation, without the one legal system claiming superiority over the other. Thus, as regards legal rights which affect land law Dutch colonists are fully amenable to native law. The mere fact that a Dutchman becomes a landowner in one of these countries, raises the presumption that he is willing to obey those statutes of the *Adatrecht* that govern landed property. To the Frenchman who has lived in the French colonies this is a surprising thing. As for the French, I shall speak of condescension and intolerance, varying according to place and time, but not, or almost never, of recognition. In Sumatra, for instance, it was held that a merchant who had obtained from the Dutch administration a concession for cutting timber in the forest, was nevertheless bound to observe local customs and to respect traditional rights ; in particular the right of certain of the possessors—in these countries we must not speak of “ owners ”—who have a religious lien on the plantations, to levy taxes on the operation. Whereas in Indo-China, in an identical or very similar case, in the Moi country in the Highlands of Annam, it was held that the man holding a concession from the French administration was under no obligation to heed native tradition or to pay any tax on his operations to the possessor of the soil, however real the religious rights over it which the possessor enjoyed. The Dutch are in fact the only “ colonial ” people who have thus fully recognised and accepted the local customary law.

The second attitude of *condescension* is common to the French and the English ; it is the spirit in which they half-accept—just as they like, and just as far as suits them—the legal traditions of the old inhabitants. Where these are useful or necessary, they are allowed to continue ; they are tolerated without being accepted. The French are ready to replace them by some decree whenever this seems desirable. When the French proclaim, as they frequently proclaimed, that they will maintain and “ respect ” local usages ; when they apply them untempered and unmodified, they do so from opportunism, in a spirit of condescension. This explains why they have so often abrogated or altered them—a thing which the Dutch have almost never done. The French have frequently done it, the English have done it too, though less often. The French benevolently study the customs of the country, and follow them not as a duty but with good will, thus demonstrating the liberalism of the French mind. If a conflict arises between local custom and French

regulations, however, then the latter must win the day. The "principle" of the French Colonial Empire is that in the case of conflict between the two legal systems, the French system takes precedence. When a contract is concluded between a Frenchman and a Native, it is regulated by French law. There will be no question, as there is in the Netherlands East Indies, of bringing into play the complicated rules of International Law, whether public or private, and seeking by subtle arguments to decide whether native customary law or Dutch law should be applied to the case in question. In every case, French law will prevail. Where *mixed interests* are involved, a contract in which one of the parties is French and the other Native, a marriage or an agreement of any kind, French law is "followed". For French law is *State law* which must override tribal or local law: national or imperial law always takes precedence of local law. From this second standpoint there can be no *conflict* in the legal sense between the two systems, for the one automatically yields to the other.

At the beginning of Spanish colonisation, the theologian Sepulveda got into a controversy with Bishop Las Casas, the former maintaining that, as far as possible Spanish law should be applied in the New World of America, and should always take precedence where there was a clash of two systems. Some fifty years ago the Swiss Bluntschli contended that the natives should be made subject to European law, by compulsion if necessary, and their old customary law should be extinguished. Lastly, there was the celebrated Englishman Cecil Rhodes, the real founder of South Africa, who declared bitter war on tribal law, making it his mission in life to abolish the tribe, and the law of the tribe, and to build the English Empire by the extension of English law.

This brings us to *intolerance* unleashed: an attitude which holds that native law should always be methodically and obstinately destroyed. The "law of the subject" must be replaced by the "law of the master"; there is no need to be over-considerate about the transition, since the French represent progress, and truth is by them revealed. *Compelle intrare*: "Enter the community which we bring you; follow the regulations which we apply to you though we apply them by compulsion and without your consent!" This is the spirit of absolutism which has been all too rampant amongst the French, at least amongst those assimilators who have preached in Algeria and

elsewhere that an end should be made of local law, a blue pencil drawn through the traditions of the old inhabitants, who should by armed force be given French law, "written Reason" both for the French and for them. They should be hustled along the path of progress and made happy in their own despite.

There is no longer this tendency—or it is much less—to do as in the early days, and impose the new law on the natives in every case, without exception or restriction, and in every place, unless there is some advantage or some necessity, for them as for the French, demanding that the voice of the ancestors should be heeded. This involves for the natives a renunciation which—and this must not be forgotten—entails a religious abjuration since their law comes to them from their gods! The choice before the French is then rather between *adopting* or *tolerating*.

In this legal conflict four planes of Law are to be distinguished : *Personal Law, Property Law, Contract Law* and *Penal Law*.

In Muslim countries *personal* law is also called personal status : the circumstances of groups or individuals, and chiefly the law regulating the family and questions of inheritance.

The law relating to wealth, goods or possessions of every kind, not only land, is *property* law.

The law governing agreements of every nature : sale, purchase, loan, contract or any other transaction is *contract* law.

The law dealing with deterrent or punitive measures is *penal* law. Amongst backward peoples the ordeal and torture are still in vogue, and it is on this plane that the clash of the two legal systems is the most painful.

We shall now examine in greater detail these four planes of law.

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## CHAPTER LIII

### STATE AND TRIBE

The State comes into collision with the Tribe and the shock of the collision silhouettes the outline of the State in crude and blinding light. We clearly see how the *French Colonial State* comes into being and asserts itself in the overseas countries. It is created of two elements.—First, the *Common Law*, valid for all, governing all, be they kinsmen or non-kinsmen, be they Christian or non-Christian.—Secondly, the *Common Speech*, the language bestowed on the natives for use in their relations with their rulers. There it is, the perfect State, everywhere. Unity of Words and unity of Laws are two interwoven elements. The fact that in ancient France, civil law radiated into the provinces, and a common law was established throughout the country, always pushing into the background the customary law of the several localities, was due to the spread of the French language, the royal speech. Under the Monarchy the unity of words made possible the unity of laws. The same process is at work in the colonies of France to-day. The function of the State is to transmit unity to the colonies, to simplify and unify both speech and law. Only since the French occupation of these countries has it been possible to speak of an Algerian law, a Tunisian law, a Moroccan law, an Indo-Chinese law, a Central African law and a West African law. All these bodies of law are composed of regulations laid down by the French, whose aim is to give the country a unity of statute law. The Abbé Siéyès in the pamphlet called *What is the Third Estate?*<sup>1</sup> justly said: "It is the Common Law which makes the Nation." To create the State in the colonies is to give these countries or each of these countries a common law; to draw a blue pencil through all the multitude of diversified and tangled laws which were in force; it means profoundly changing the order of the laws. Let us analyse the *conditions* and the *solutions* of this phenomenon.

By *conditions* I mean that the State encounters in the colonies difficulties, obstacles, opposition, and delay. It can by no means establish itself without striking a blow, and even to-day it is

<sup>1</sup> *Qu'est-ce que le Tiers Etat?*

nowhere completely perfected and consummated. In these countries, established fact rears a barrier against unity. The French do not wish to, nor could they if they wished, give too suddenly and harshly a simplified law to these populations, a law applicable to all, ignoring the existing facts of kinship and religion. These obstacles, which always involve delay and which arouse resistance and protest among the inhabitants, are created by already-existing groups who have and keep their own code of laws. These groups are very diverse and their existence is an obstacle to unity. There is the Tribe for one, and there is the Village too, which is a more condensed, more close-knit tribe, a group of kinsmen more closely related than the tribe, who believe themselves to be one and all the descendants of one common ancestor, who are similar—or think they are—in spirit and in blood, who are bound by a law which is their very own in virtue of their kinship. Hence, both the tribe and the commune are obstacles to the formation of that common law which the State brings. The Family is another obstacle to the unification of legal enactments. If you are to create a law which is to be the Common Law in the colonies, you must succeed in depriving the family group of many of its attributes : the privilege which it enjoys in the bosom of the tribe. Being the most intimately related, the most compact, and the most exclusive group of kinsmen, the Family possessed its own particular law within the tribal law. If you are to give a State Law to the colonies you must put an end to two of the traditional family privileges : the right of *sanctuary* and the right of the *blood-feud*.

The family in the first place offers *sanctuary*. Kinsmen, in their capacity as kinsmen, believe themselves bound by inveterate tradition not to denounce the crime of a relative, but to shelter him and protect him from French justice. In a colonial country there is no use expecting a group of kinsmen to co-operate with the State in its functions, either by denouncing or by giving evidence against an offender who is of their kin ! The harbouring of a criminal by his family group is extremely common even amongst more advanced circles, for according to their tradition mutual protection is a duty—even protection against the State ! The Annamite Code was compelled to recognise that it was excusable, and not criminal, for one kinsman to give sanctuary to another ! In France the concealment of an offender would render his host guilty as accessory to the



offence. Such is the conception of the State in its full and perfect form ; public order takes precedence of private order, and national order of family order. Yet in Annam, down to the present day, the kinsman who shelters a delinquent kinsman is held innocent. Here, in an advanced, not a backward, country, the opposition between the Family and the State is glaringly apparent.

Next comes the *blood-feud* with its two aspects, the active and the passive : on the one hand, the obligation resting on the group of kinsmen to avenge on some one of the offender's kin any injury inflicted on one of them ; on the other hand, the complementary obligation resting on a group of kinsmen jointly to suffer the consequences of the family blood-feud. There is here a dual solidarity active and passive, the duty to act and the duty to endure, the duty of killing or of being killed in the place or stead of a kinsman, since the blood-feud is a collective affair ruling between one family group and another. This forms a second obstacle to the State since it militates against the working of any common or national penal law applicable to all. These two characteristic usages are the chief amongst many obstacles to the establishment of the State, and both derive from the family group, as long as this preserves its identity and its activity and continues to assert its personality.

Alongside the Family, the Commune and the Tribe, there is in overseas countries the Church which hampers the State, for the church or sect has its own private law which is a sacred law. In the case of church and sect there can be no question of a common law, a secular law, divorced by its nature from religion, and valid alike for the faithful and the unbeliever. Even in the advanced colonies you find the temple or the mosque serving as honoured and inviolable sanctuary for the criminal, the brother in religion who is able to reach it in defiance of authority. The church and the sect, and in Muslim countries the brotherhood, claim the same right to harbour the criminal and protect him against the State as was claimed by the family group in the case of a kinsman. In Negro countries which have adopted Islam, the secret society is commonly more persevering and more successful in exercising this right !

These things being so, the State cannot hope to rule in the colonies until it is able with time—and this is no easy matter—to put an end to these traditions of privilege which prevent its establishing itself.

Such are the conditions which confront the Colonial State as it seeks to assert its sway. What then are the *solutions*? How and in what way has the State been able to make headway against these obstacles and hindrances? By what means have the old groups with their old statutes been—though not always—overcome?

Three solutions have come into play in the French colonies, as in old-time France—the same methods seeking to achieve the same progress—to make an end of the interlocking, overlapping traditions of local customary law: provincial law, commune law, family law. First, the real *common law* (*statut réel*), secondly, *public order*; thirdly, *private option*.

The absolute, radical thing is the *statut réel*: the institution, without transition or restriction, of a Common, Universal, Territorial Law embracing the whole country; the death sentence executed on all the old rules and regulations; it is assimilation or frenchification. When in our day, for instance, the French, without striking a blow, extend to the colonies the French laws protecting the working man, without taking heed, as they should, of the inconveniences and difficulties involved, they are moving in the direction of the *statut réel*. This is the term which the old commentators used, notably Loisel: *statut réel* is royal law and State law which came to prevail in France, first in intention only, but claiming to apply to the whole country, expressly putting an end to and firmly abrogating all the ancient existing rules and regulations. Loisel, the author of *Customary Institutes*,<sup>1</sup> enunciated a new principle: "All customs are actual facts."<sup>2</sup> Hereby he anticipated the principle which was accepted in the 18th century, particularly the principle of what has been called *enlightened despotism*, according to which a Royal Law is essential in any country—the phrase National Law was ere long to be substituted—a universal law for all the inhabitants within the frontiers of the kingdom; a law thus bounded by geography, and by geography only. The Prussians had such a law in the Code of Frederick dating from the middle of the century in question. Speaking of the Royal law, this proclaims as a principle a new maxim: "Neither outward extension nor inward restriction." *Within* the territory State law must reign supreme and reign alone; all local rules and regulations are abolished. *Outside* the territory it ceases to reign, the frontiers set the limit to its power. Later the principle

<sup>1</sup> *Institutes coutumières.*

<sup>2</sup> *Toutes coutumes sont réelles.*

became established, notably in France, that a person is amenable to the State law—formerly the Royal law—according to his place of residence or habitation. He becomes, absolutely and fully, legally subject to the laws, simply by reason of the fact that he lives in the country, that he is settled there and dwells there for at least a certain length of time. In ancient France the period was a year and a day. The question of residence is now the determining factor, not as of old the question of parentage.

I must truthfully admit that in France itself this state of affairs is quite recent. The two first French laws which can fairly be called national, in that they apply to every Frenchman, are a Statute of 1731 regulating Donations and a Statute of 1735 regulating Wills; and these were laws of particular, limited scope. It was only two centuries ago that this very old country arrived at passing laws that were State laws. As has been pointed out, the first State law of a general nature which prevailed throughout the entire national territory: which held good for every Frenchman without exception, whether he was a Jew or a Protestant, whether he was a Provençal or a Breton, was the Civil Code!

In so far therefore as the State implies a common law, the appearance and the institution of the French State in a legal sense, is a recent, and a very recent phenomenon. To borrow an expression from the Code of the Prussian Frederick, who in such matters was extremely systematic, “a certain, universal, national law”—or a territorial law, as we should say—has only been established in France for a little over a hundred years!

This is why, up to the present, the solution of the *statut réel* has not been put into action. It has only come into play in particular cases and for particular purposes. It is of course true that the principal French Codes have been extended to the colonies by decree or by law. They apply, however, only to the French; they do not apply, or apply only to a very limited extent, to what are called the “Indigènes”. There is one exception, however: the Penal Code. This, the French say, concerns public order, and is therefore valid for all the inhabitants in the colonies as at home in France. As regards private law, the natives are subject to certain laws only, and those are adapted to local conditions, laws relating to the registration of vital statistics—very timidly enforced—and laws relating to labour. However strong the French desire to assimilate and

frenchify the colonial native, and bestow French Law on him without restriction, they see no way of imposing it on him and they cannot do it.

Secondly, *public order*; this is the solution most commonly adopted by the French: they leave the native inhabitants their old traditions on the sole condition that they conform to "public order". It follows that in cases where necessity or morality demand it, the ancient custom or regulation must be given up and must yield to public order. Public Order in the colonies is therefore a body of Laws, admittedly very limited in range, which the French can change since they themselves drew it up, and which they wish to see in force in the whole of their Empire wherever the French flag flies. These are "fundamental laws" as they would have been called under the French kings; the fundamental laws of the Colonial Empire which must therefore be obeyed by all the inhabitants of the colonies without distinction of race or colour, of creed or kinship. They form a Public Order which is therefore a *statut réel*, and not personal: which is territorial or imperial.

This Public Order in the colonies has two aspects according as it concerns the relations between Frenchman and Native or the relations of natives amongst themselves.

In relations between Frenchman and Native, particularly where contracts are involved or agreements with the colonists—who have of late increased in numbers—Public Order demands that French law only should come into question: in "mixed relationships" French law carries the day and takes precedence of local custom, for, as I have said, the French here take a different line from the Dutch. In the relationships between the natives themselves, a tendency has grown up in the last hundred years or the last fifty years—varying according to the place—for French Public Order to penetrate, and for certain regulations derived from French law to be imposed. Where these regulations are in force they provide a territorial or imperial *statut réel* for the colonies, being applicable to all inhabitants alike. The Public Order solution means the maintenance of personal law but tempered and altered by the *statut réel* in all cases where the French feel—rightly or wrongly—that necessity or morality demands its supersession by French laws enforced on all inhabitants, in place of those they had set up for themselves.

At the beginning there was, even in Algeria, a somewhat camouflaged procedure by means of which a measure of Public

Order, equivalent to a *statut réel* making no distinction of kinship or religion, was introduced, to regulate the conflict between different local regulations and customs which had co-existed in the country before the French occupied it. In Algeria, for instance, they found, side by side, Arab law and Berber law, and, within each of these, variant customs peculiar to one locality or another. The Muslims recognised four different rites, actually amounting to four separate sets of laws, differing from each other in several points. All these manifold systems came more and more into conflict with each other, when the French occupation came to multiply the relations of tribe to tribe, of region to region, of country to country, and above all, of creed to creed. These various people, who now came into touch, who contracted, bought and borrowed, who had previously led a self-contained existence, almost one of complete isolation, now found themselves increasingly entangled in conflicts with French law. There was another motive—or pretext—the *silence of custom*: if customary law is silent on a certain point, let us be guided by French law. In this matter the Belgians have been more diffident than the French. Later, as I have observed, the French went further and acted more openly and more directly even where there was no clash between native regulations and customs. Public Order was announced and proclaimed, and the necessity was emphasised of laying down a common order for all, an order valid even *within* one group as well as between different groups, within one region as well as between different regions, within one creed as well as between different creeds. Necessity, convenience, efficiency, morality, humanity, and more especially hygiene and education, all demanded the forbidding of sacrifices, even animal sacrifices, the forbidding of cannibalism and infanticide, the forbidding of gestures and acts which in France would be accounted crimes or offences, and which were nevertheless rooted in native tradition. The obligation was therefore laid on the native inhabitant of the colonies to respect a body of French laws which constitute a *statut réel* and a Colonial Public Order.

The same state of affairs still exists in the mother-country to-day. France maintains and applies to foreigners many provisions of their own laws, and thus there exists in such cases a personal law which forms an exception to the *statut réel*. In order to limit the application of this personal law, the French Civil Code lays down that no exception can be made to the

"Laws of Public Order" which are in force for every resident in France. These Laws of Public Order are defined in the Civil Code, and legal commentators vie with each other in arguing about their phraseology and their content. They all agree, however, on these points: that the Constitution is a law of Public Order which foreigners must respect; that the penal laws are of Public Order—as are laws relating to property and methods of enforcement. "Moral laws", more particularly monogamy, are also accounted of Public Order, and perhaps also laws relating to the family, to qualifications and to inheritance. Even to-day, the French are obliged to keep alive in France this idea of Public Order, for the *statut réel* is not always operative; foreign laws have sometimes to be applied, though always with the reservation—in France, as in the colonies—that Public Order is *statut réel* and must be enforced on all inhabitants whether foreigners or Frenchmen.

Lastly there is the solution of *Private Option*, that is the privilege accorded to all inhabitants or to some amongst them, of voluntarily, deliberately, choosing if they wish to put themselves under French law. The power is given to a native to opt or choose of his own free will, and under no pressure or compulsion, that French law should govern his actions and relationships. There is here no question of *statut réel*, for there is no imposition of French law on the inhabitants, since they are free spontaneously to have recourse—as in Algeria they often do—to French jurisdiction and to be judged according to the terms of French law. This is *Private Option*, a right which is open—not always, but sufficiently often—to French subjects in the colonies. In another context I shall mention that this right is not recognised in French West Africa—with the exception of Senegal—for all the regulations of personal right. Up to now, a native of the French Sudan, even though he be an advanced person, does not enjoy the privilege of spontaneously placing himself under French law. There is only one way in which he can do so, but this road is wide open for him: he can become a French citizen, which is to choose French law. In very numerous cases, enumerated in a decree of 1912, amplified in 1937, it is enough for him to ask and easily obtain the status of a citizen, which cannot be refused him. His citizenship confers on him the full unquestioned right of being governed by French law. It is not with his case therefore that we are concerned; we are considering the inhabitant who remains a

“subject”, a “native” as we say, who cannot or will not become a citizen, perhaps because he would regret bidding farewell to his own customs and traditions. For this non-citizen the right of private option remains open as far as property and agreements are concerned: land law and contract law. This option has one peculiar and singular characteristic; it is not a general or total option. The native cannot opt for French law *en bloc* and declare before the court that he will for the future be subject to French law entirely and without restriction. If this is what he desires, he must become a French citizen under one of the categories laid down in the French legal texts. In all other cases, if he remains a subject he can opt for French law in one particular contingency only, for one definite occasion, for one special act, for such and such a specified determined agreement, purchase or loan. The interested parties have therefore the privilege of appearing before the magistrates and making a joint declaration that they are agreed that they wish French law to apply to this specific agreement of theirs, and to be judged according thereto in respect of this particular contract. What they can *not* do, is to declare once for all that they agree to be subject to national law for all their future acts for ever, without specifying any given act. Private option is of no universal application; it can operate only in a definite, specified case. It is, however, recognised that the private option in favour of French law may be exercised tacitly and not always explicitly, for it is enough to appeal to a French court in order to be judged by French law; it is enough that a contract be drawn up in approved form in front of a French magistrate, it will then be governed by French law. In such a case the option is implicit, not explicit. Some officials have gone so far as to wish—but this solution is called in question—that the native who gets married by “the official Registrar”, that is, in accordance with the forms of French law, should by this official be made subject to the application of the fundamental regulations of the Civil Code. I am not myself sure that it would be opportune to go so far as that. I do not believe that the native who repaired to the Registrar to have his marriage duly sanctioned and recorded would always have foreseen that this implied being married, in every respect and with every consequence, according to *French* laws!

A judgment of the Cour de Cassation of January 29, 1936, has however decided that marriages contracted by native

Algerians "in French form" before the official Registrar, imply and involve renunciation of the parties' personal laws; that the form in fact is fundamental, and that approach to the French office of registration implies a tacit option in favour of French laws and the acceptance of the law of the State.

Thus, in so far as the State stands for a common territorial law and bestows legal unity on the colonies, it has established itself by various means and various roundabout ways. There are three open roads by which the State can arrive at ruling over the inhabitants merely in virtue of the fact that they are resident in the colony: *Statut réel*, *Public Order*, and *Private Option*. Kinship and religion alike matter little, for a common national, nay, a common imperial law has been set up, which is the true symbol of the State. By establishing the census and registration, by "registering" private deeds and documents, by setting up French-style jurisdiction for the inhabitants: on all these planes a beginning has been made of inaugurating the State, which will in the future presumably win the day and achieve unity of language and of law.

All this causes at times a profound disruption of traditions. What effect has the State in practice exercised on the Tribe, locally, in one place and another? What, in particular, is this phenomenon we call "detribalisation"?

Now, this word may be used in two very different senses. It may refer to the fact that one or more individuals, one or more families, are subtracted and separated by emigration from the tribal group; that they have gone off to work in the towns and cities where they are often proletarianised and urbanised. Or it may mean that the whole tribe in a body is weakened and altered, that its traditions and modes of thought are turned upside down or at least eaten into.

I want to discuss the second of these phenomena: the influence exercised by the State on the collective not on the individual plane. This has had three results: the *destruction* of the tribe, the *negation* of the tribe, the *re-making* of the tribe.

In the first place the tribe is *destroyed* in so far as the Law has put an end to ancient tribal laws and customs. First in Algeria, but of course later in other colonies too, the French have laid hands on these tribal groups to crush or knead them, to disjoin them or to join them together, but on terms very different from those existing before the coming of the European.



Legislation about the Tribe began in Algeria as early as 1863. While calling it by the traditional name *duar* the French profoundly transformed its ancient laws and customs, almost always destroying it in the process. They took no heed of the identity of the old long-standing tribes. They worried their heads very little about the tribal territories over which ancient inviolable tradition had granted them rights of passage. The aim of this law of 1863 was to establish individual property rights in land throughout Algeria—another method of weakening the tribe. Before 1863 the census had recorded the existence of 376 tribes; a few years later, in 1870, instead of these 376 the legislation of 1863 had set up 676 *duars*, territorial divisions overlapping the tribes, and each representing not more than a fraction of a tribe. The traditional groupings, each of which had its own personality since its members were kinsmen, descendants all—or so they believed—of one common ancestor, were thus broken up. A different procedure was elsewhere employed, especially in Tunisia: far from dividing the tribes the French here condensed them, their number was reduced not increased, and the *qaidats*, as they are called, which were 80 before the coming of the French, are now 37 only. Whether by disruption or by amalgamation, in either case the old groupings lost their identity; they were melted down and recast. It was their fate to be destroyed and remade. In Algeria, where the French were more numerous, they went further still, they founded communal groups after the French fashion, communes of the French type with full powers and run by a Mayor and a Municipal Council. To each commune were annexed such ancient tribes as were living within the area assigned to that commune. Out of a population of six million now living in French Algeria, two million inhabit these full-fledged communes. That is to say: two million Algerians have lost their tribe and find themselves annexed to French villages. Tribes were divided or dismembered by the *cantonment* method, or it might be by *confiscation* of part of their territory (*prélèvement*), if the authorities thought that their collective domain over which they had territorial rights was too large for their powers of development. In such cases, part at least of this collective territory was taken from them and either treated as public property and assigned to the communes or granted to French colonists as a concession. Thus by 1870 the collective territory of the tribes had in Algeria been reduced from three hundred and forty-three thousand hectares

to two hundred and eighty-two thousand<sup>1</sup>. Roughly one-third of the tribal area had been annexed either by the communes or by the colonists, and the tribes lost their possessions. If the French acted thus in their Colonial Empire, especially in North Africa, other people would have liked to do the same elsewhere, and from the early days in South Africa, some forty years ago, theories were sometimes worked out. Cecil Rhodes's solution was to abolish the old tribal system of the natives, and systematically to detribalise them—the very word is used in the legal texts—by putting an end to the old customary law and replacing it not, you may be sure, by the English system, but by a midway system applied to the more advanced negroes;<sup>2</sup> above all by creating individual property rights and laying hands on collectively-held lands. The tribes made every effort to preserve them and prevent their confiscation, for this procedure would have struck at the very root of all their collective rights. The desire of the Whites in South Africa was to destroy the Tribe, and in this they were frequently successful; so much so that to-day they are often tempted to regret their excessive anti-tribal zeal. One of the motives which has led them to plant out their natives in "reserves", is the feeling that there was a great need to restore the ancient system of the tribal groups, and forbid the White Man's access to these regions, so that the tribe may quietly complete the process of dying out, but do this peaceably and at a distance.

In the same way, the Americans from 1893 onwards set about getting rid of the tribal régime, they have set their heart on Americanising the Red Indians.<sup>3</sup> There were two hundred and sixty thousand of them at the last census, segregated also in distant reserves, and the Americans have imposed on them a law of their own, intermediate between ordinary American law and the old Red Indian law.

The second solution is the *negation* of the tribe. For it frequently happens, especially under the French, that the tribe has been preserved, and that for convenience of administration the authorities have adapted themselves to it as well as they could. Since in a material sense the Tribe was not dissolved, the commentators devised another scheme, for it shocked their feelings

<sup>1</sup> [Roughly from 857,000 to 705,000 acres. EOL]

<sup>2</sup> Evans, *Native Policy in Southern Africa*, 1934, pp. 5 f. and 48 f.

<sup>3</sup> See Hodge, *Handbook of American Indians*, I, 1907, p. 332 f.

to see a primitive and archaic thing like the tribal system still vigorously in being : this cut right across their sacrosanct principle of assimilation. Thus in French West Africa, where the tribe survives down to the present day, the magistrates have refused until quite recently to recognise it from the Law's point of view as a legal group or institution. Several decisions of the French Courts laid down that the tribes were in no sense collective bodies as understood by French law ; consequently they possessed no personality ; from a legal point of view, they did not exist, a case could not be brought before the Courts in the name of a tribe, as it could in the name of a commune or a trade union. Where a French decree had declared that the traditions of a tribe should be maintained and where this decree was violated, would the tribe as a body be empowered to plead to ask that the French decree should be enforced ? The answer was " No ! Because the tribe has no personality, no recognised legal existence, it is simply a fact ; it cannot be a party to a suit." This judgment seems to me to be the very *negation* of the tribe.

Here is a judgment of the Court of First Instance in Dakar, on March 22, 1924<sup>1</sup> : the Governor-General was asking for the registration of certain parcels of land situate in the territories of various tribes ; the chief of one of these tribes opposed the request, pleading the rights of his tribe over the said lands ; the Court rejected his plea and gave judgment in favour of the public powers, on the ground that the tribe is in no sense a collective body from the point of view of Civil law. The Dakar judge then set himself to consider whether the chief could be allowed to plead in virtue of a mandate from his tribe, and whether the tribe could be considered as a kind of society in the French sense, a professional syndicate, an association of 1901, a co-partnership of joint ownership. The judge displayed a touching zeal in trying to find a satisfactory formula : could not the tribe be considered as a group of proprietors like a land-reclamation syndicate ? But he came to the conclusion—which need not surprise us—that the tribe has no existence in the Civil Code : it simply is not there and therefore cannot be party to a suit in a French court : a denial of justice, most logically arrived at.

It was not until ten years later that the Court of Appeal

<sup>1</sup> Recueil Darest, 1934, jurisp., pp. 106, 201, 1924. See article by P. Darest, *idem*, *doctr.*, p. 1 f., 1935.

sitting at Dakar in 1934, laid down for the first time in French West Africa that the tribe is in fact a collective body of a native type, possessed in consequence of personality, and therefore having legal power to hold land in joint ownership and being qualified legally to plead. The case in question was entirely parallel to the case of ten years before : the public powers were claiming the right to violate the traditional rights of a tribe to its land. The Court of Appeal thus expressed its judgment : " It is an unjustified application of French Law to institutions that are foreign thereto, to attempt to subject indigenous communities to French Municipal Law and to reserve to the Mayor of a Commune the qualification to represent them." For such was indeed the claim made : the tribes who had existed from time immemorial in a certain region might at a pinch be allowed to plead before a French court, but only on condition of being there represented by the French mayor of the commune in which the tribal territories lay !

The same negation was often seen in other places too. In 1922 the Court of Noumea in New Caledonia also stated that the Kanaka tribes are not recognised bodies, that they have no personality and cannot defend their rights. In 1925, however, the same Court reversed its own decision and decided that no executive measure of French law could be carried out amongst the tribes if it violated the ancient rights of the tribe. The fact remains that for a hundred years in Algeria and West Africa French commentators and magistrates denied the existence of the tribe—being, as they were, incapable of fitting it into the framework of French Law.

. . . . .

The last and commonest solution is the *re-making* of the Tribe in order to accommodate it to new needs. The aim now was not to destroy, nor to deny, but to restore and consolidate the tribe, so that by starting from this phase of social development the phase itself might with the passage of time be outgrown. People have recently been anxious to re-establish the tribal law which they had weakened, or abolished, often without foreseeing the consequence of so doing, imagining that to issue decrees was enough to establish order, and taking no heed of the power of an age-old customary law. In various countries, more especially in France, people realised that they had been wrong, that the tribe was a pillar of *Order* and that it was worth while to lean on it for support.

Thereafter the aim was to preserve the tribe while adapting and improving it: to *conserve-by-transforming* tribal law, maintaining it, but at the same time adjusting it to meet new requirements.

In the French Colonial Empire this re-making of the tribe took place, but its ancient character was changed in one major particular. The tribe had always been a *kinship* group; it had now to be transformed into a *territorial* group, with a circumscribed administrative system, modelled on that of the French municipality. In every case where the tribe was maintained and preserved, consolidated and rebuilt, it was profoundly transformed, since to meet the needs of administration it was essential to circumscribe it geographically. Each individual then becomes part of the tribe because he lives within this area, whose limits are laid down by the authorities, and comes under their jurisdiction. It is not therefore, as it was of old, a matter of descent or ancestry, real or imaginary, that makes a man a member of the tribe, it is purely a matter of residence or domicile. A man belongs to a certain tribe, as in France he belongs to a commune or a department, simply because he happens to live in a certain spot. This effects a profound transformation which changes the manner and spirit of the social group, but which by so doing may serve to maintain and guarantee it. It is a reform like that of Cleisthenes<sup>1</sup> transferred to a colonial country. Thus in Algeria a French law of 1860 by a *senatus consultum* established, or re-established, the *jama'a* of the tribe according to habitat: it set up again the tribal assembly, the body of old men or elders: the ancient traditional government of the tribe which had in many places disappeared, and which the French administrators, especially the military, had destroyed—frequently without noticing that they were doing so. These institutions have been re-established and reinforced; recent decrees have in particular granted them more extensive rights of representation. There has in consequence been, in more than one sense, a restoration of the tribe in Algeria.

Similarly in French Morocco a *dahir* of 1919 restored the status of the tribes, to accustom them to administer the tribal properties under the control of the State: it accorded them personality, and an elected *jama'a*, set up a guardianship council, and forbade the alienation of land held in common for common

<sup>1</sup> [The grandfather of Pericles, took Athens in 510 B.C., enlarged the city, and created ten tribes instead of the existing four. EOL]

use. A famous *dahir* of 1930 restored to the Berbers their customary law, their tribal councils and their tribal justices and removed the Muslim justices who had in the course of time seized authority. In Morocco the tribal *jama'a*, and in other places the tribal court, the Court of Customary Law as it was called,<sup>1</sup> was restored, though under the control of the French authorities, and subject to appeal to the French courts. This is a good example of adapting and consolidating.

In Tunisia a decree of 1935 relating to the tribes and their collective tribal properties (a decree on which my pupil M. Housset has written an admirable thesis), makes the collective tribal lands inalienable, non-distrainable and imprescriptible. While endowing the tribe with personality, it provides for the election of a council of administration elected by the heads of families and controlled by the French authorities through local and central guardianship councils. In Togoland an order of 1936 achieved the "re-grouping" of the ancient cantons which were "endowed" with personality and given an accountable and responsible chief authorised to organise censuses and collect taxes.

If, however, you want to see the re-creation of the tribe displayed according to a premeditated plan, you must go to the Belgian Congo. There, the Belgians at first utterly destroyed the native traditions, wiped out the old law and set up a new law. Experience showed that they must retrace their steps. They changed course abruptly and completely; a decree of 1933 re-established "the traditional native communities"—as it was decided to call them—but completely transformed them. The Belgians formally recognised these native communities as being legal entities and possessing a personality which entitled them to act in their own interests, and they did not hesitate to accept and to adopt—I don't think the word is too strong—the tribal system within the framework of their Colonial Law. As far as possible they restored the limits of long ago. They restored the authority of the Chiefs and called the groupings *Chiefdoms*.<sup>2</sup> No law formally asserts that the tribes possess personality. But the Chief—who must be chosen in the traditional way and not by the administration—is empowered to represent the tribal group. The decree adds that in any region where the traditions may have been forgotten, account will be taken of the wishes and preferences of the inhabitants in choosing the Chief. The whole is a legislative attempt to return to tribal

<sup>1</sup> *Tribunal de l'ordre coutumier*.

<sup>2</sup> *Chefferies*.

law, but at the same time to modernise and perfect it. The Chief will have the duty of keeping a budget, the right of administration and of raising loans—all of which implies the education of the Chiefs; and also the setting up of Councils which have already been established.

Wherever the tribes had been scattered and pulverised and fragments only remained of them, special chiefdoms known as *sectors* have been created. These are an artificial composite of tiny chiefdoms which had lost the traditional identity of a tribe and the feeling of kinship. New tribes have thus been *called into being* where the tribes had disappeared. These sectors have been given Chiefs and Councils, not of course elected—in the circumstances election was out of the question—but at least nominated by the District Commissioner who corresponds to the French Administrator: as far as possible these nominations took account of the people's wishes and preferences.

The English too—but this is a big subject—have established the Indirect Rule, sponsored by Lord Lugard and by Sir Donald Cameron,<sup>1</sup> and have succeeded in reinstating tribal law while most happily refining it.

We thus see how there has been a marked evolution in the Colonial Empires, of the relations between Tribe and State. This evolution has in every case taken one direction: from the destruction of the tribe, in a sort of spirit of contempt which went as far as the negation of the tribe, in the countries where its spirit and strength had been preserved, by denying its very *right to exist*, and proceeding to the re-making of the tribe and its re-formation in order to give it new youth, the only way to guarantee its future.

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<sup>1</sup> [Oddly described by Professor Maunier as "Sir Cameron". EOL]

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## STATE AND FAMILY: TRADITIONS

Amongst all Africans the *Family* consists of those who have a common ancestor, in fact or in fiction ; all those who, through their descent from this ancestor—often an imaginary person—are of the same blood, and who for the same reason are of one spirit. Kinship depends not, as with us, solely on blood relationship, it depends even more on kinship of spirit ; it is the *virtue* which descends on all members of the kin from their sonship to the common ancestor ; this is a mystic, magic virtue : it is the sanctity which they have inherited from the distant forefather. By this fact alone each is in due course the bearer of the same blood since the people of the same spirit mate together, for they practise endogamy, and by no means exogamy,<sup>1</sup> of the family group. Kinship of spirit thus always in time produces kinship of blood.

The group of agnates, the society of male descendants of a common ancestor—whether a real or imaginary ancestor, and very much more often imaginary than real—is the typical society of native Africa. Despite the infinite diversity which we meet in the picture of family types amongst backward peoples this is the common characteristic which confronts us. I have discussed it very fully as it is seen in North Africa, in my book *French Law and Native Custom in Algeria*.<sup>2</sup> Here, drawing on my own book, I want greatly to enlarge the field of vision. “Kinsmen” in fact has two closely interwoven meanings ; kinship in the pure sense and proximity or contiguity. *Kinship* with its attributes ; unity of blood and unity of spirit ; mystic not physical kinship ; racial kinship, we might say, and spiritual kinship since it implies the transmission and transfusion from generation to generation through a long period of time of the virtue and the spirit of a first ancestor. It is also in effect *proximity*, contiguity ; living together, mating together, the kinsmen are close to each other

<sup>1</sup> [This is a somewhat sweeping generalisation. Africa is a large continent of multitudinous tribes. Choosing at random : the Swazi of Swaziland, the Lango of Uganda, the Tallensi of the Gold Coast, the Lovedu of the Transvaal, and no doubt innumerable others, are definitely exogamous ; while many tribes are exogamous as regards the tribe, though endogamous within the clan. EOL]

<sup>2</sup> *Loi française et coutume indigène en Algérie*.

in every sense of the word ; the kinsmen are neighbours living side by side. This is a characteristic whereby the African conception of kinship differs from ours. Kinship is with us a matter of blood-relationship : whether we are near or far, whether we remain together or are separated, we remain kinsmen ; it is a legal bond, regulated by law and always abstract, independent of actual circumstance. This is not so with the Kabyles of Algeria : with them, people are kinsmen in proportion as they remain near together ; either they live in the family house, or in the family enclosure, or they remain under the *manus* of the head of the family group. The Algerians have a saying which expresses this : " He who is far away is not thy brother." The fact that a man has gone away to a distance often excludes him from the rights of inheritance ; he inherits nothing or he inherits less. It used to be the same in France in the *laisible*<sup>1</sup> communities which were also groups of kinsmen living together ; communities of agnates sharing " bread and cooking-pot " ; the man who went away was excluded from the rights of succession, the first attribute of kinship.

So kinsmen are neighbours : and to be neighbours is to be kinsmen in more than one sense. When you become a neighbour and when by adoption you are permitted to live in the bosom of the family, you *become* a kinsman ; you have the same powers and the same duties as a kinsman ; you go into mourning exactly as a kinsman.

From this it is clear that we should emphasise the distinction in a primitive country between the *family* and the *household*. In France it is the household and not the family which is in the foreground ; the living, concrete group living together is the household, or the married couple with their young children. Almost always, the married couple in France is emancipated by separation and by distance. This is the evolution which has taken place in Western countries : the *husband's* power has superseded the *father's* power ; it is the husband alone who rules—in a steadily decreasing degree !—over his wife and children.

Having noted this point, we must define more exactly some attributes of the family group, notably the two following : its *composition* and its *constitution*. We shall thus the better appreciate the profound contrast between African and French Law.

As regards composition, the African family group comprises

<sup>1</sup> [See last paragraph, p. 251 above. EOL]

people of all ages and as many as four or five generations. When sons and grandsons grow up they do not go away ; they remain at home under the authority of the father or of the eldest son. Not that they all live together in the one house, as do family groups in other places, the southern Slavs of the Balkans in the *Zadruga* group, or the *Moi* of Central Annam. Amongst the Berbers and the Bantu several houses, grouped round a central space and surrounding the same compound, form a closed family quarter encircled by its own enclosing wall : a state, as it were, within the state. When one of the sons grows up and takes a wife, "married quarters" are built for him in a corner of the compound that has been reserved for the foreseen contingency that the family would increase with time. He lives therefore beside the family group of which he still forms an integral part, still subject to the authority of the *paterfamilias*. I have seen in Kabylia a family of *marabuts*, conservers they of the ancient traditions, comprising five generations, where the great-great-grandfather appeared to be at least a hundred years old. The group consisted of some sixty individuals, ranging down from the old patriarch to quite tiny children. There is no liberty, no "coming of age" amongst people who continue to live in a compact family group.

In its *constitution* or government the African family also forms a contrast to the European. This very compact group of near relatives, or community of co-habitants, presents two aspects : communion and division ; for nothing is simple amongst backward peoples.

There is *communion* of the community since the kinsmen, being also neighbours, seeing one another day in day out, have common powers and common duties. A common law, knowing no restriction or remission, is in force in the bosom of the family group. The personal power of the chief or of the great-grandfather, or in default of these of the eldest son is nevertheless tempered and moderated, as in ancient times it was in Roman law—the analogy is in fact singularly striking—by a whole body of collective power.

Though it is true that the *paterfamilias* is omnipotent, both in theory and in fiction, he cannot in practise use his power without consulting brothers and sons. If some important act is to be undertaken—the emigration of the family for instance, or, more frequently, the alienation of some common property—some measure which reacts on the community, the *paterfamilias*

has traditionally no right at all to decide without consulting the heads of households who sit on his council and permitting them to intervene. This is what the ancient Romans called the *concilium propinquorum*, the council of near relatives or of the kinsmen, of whom we know too—though rather vaguely—that it assembled on the same sort of occasions to take a share in the serious decisions of the family group.

In this system it is tradition and custom which rule. In its essence the family group is a *community* on every plane.

There is *community of domicile*, which is the qualification for the rights and consequences of the title of kinsman, since a man is often deprived of these if he moves away. There is *community of occupation* or possession, since the patrimony belongs primarily to the family and since the most important possessions, the fields and the houses, are family and not personal possessions. As we shall presently see, the household has its own goods, a person has his own goods; the individual therefore already enjoys some rights of possession: the married couple even maintain a distinction between the goods belonging to the husband and those of the wife; but that is all a secondary matter. There is *community of work*, or joint activity, since the most important jobs are done in common and performed by the family in its entirety: the building of the house, the labour of the fields, religious rites and even play; all these are activities of the whole group communally carried out.

*Division* or subdivision also increases more and more. The married couples—let us call them *households*—have in a sense their separate existence in the bosom of the family; they are distinct, in a legal sense they enjoy autonomy; they have their own goods; their own ambitions which are not merged or lost in the interests of the whole group. They have their own feelings and aspirations; and great conflicts, sometimes bloody conflicts, occur within the family enclosure between one household and another, especially between the women. The conjugal group has therefore its separate and distinct existence: it has its interests and its prejudices and in consequence in a limited sense its particular rights and gains. Communion is thus tempered and moderated by the increasing play of division.

The bond holding the family together is nevertheless very strong: the household remains dependent, subordinated as it is to the *paterfamilias*, inasmuch as he has the right to decide, without their consent, on the marriage of the two partners,

frequently even without their knowledge, especially if they are of tender age. It is by no means rare in Negro countries to find parents of very young children promising that such and such a boy and girl shall marry in the future when they have reached puberty. This promise is valid, and so excludes all question of free choice by the interested parties ; the arrangement is made without their being informed.

The method by which the household group is created presupposes *ab initio* the intervention of the *paterfamilias* in virtue of the authority he has been able to retain.

Approaching the system of the *household* rather than the system of *marriage* ; picturing the union of the two spouses from the point of view of its results rather than its origin, and thus noting the characteristics of the rights in force between them, the conjugal group appears dependent. There are two chief characteristics : *polygyny* and *repudiation*.

Amongst the Berbers, the Arabs, and the Bantu, we find *polygyny*, namely, the husband's right to have several legitimate wives at one and the same time. It is becoming rare in Algeria and Morocco ; but if we had the right to enter the house we should probably find it more frequent in the towns and amongst the well-to-do Arabs than amongst the tribes. For polygyny is a luxury, and is becoming increasingly so, thanks to the French, whose coming causes everywhere a rise in the cost of living. Such is progress ! It is only in the Negro areas far from towns that a plurality of serving-wives is still popular, more than ever popular ; for these wives spell wealth and power by working and bearing children for their lord.

Now, polygyny serves to strengthen the tie between the conjugal household and the family group, for the wives are subjected to the authority of the wife of the head of the family. A *maternal* authority exists side by side with the *paternal* authority. The grandfather's or great-grandfather's wife, the wife of the eldest male, is the *materfamilias* possessing the right to command the women and girls. The sons' and grandsons' wives are bound to obey her. Hence polygyny marks the bond attaching the married household to the family group.

Secondly comes *repudiation*, which is responsible for that instability of the married household which is so marked a characteristic of all these countries. The thing that can and should normally endure is the family group—not the married household—the community of the father and his sons, the group of sons

under the authority of grandfather or eldest brother. In contrast thereto is the conjugal group ; it is unstable and not made for permanence ; the husband has the right to rid himself of a wife by simply pronouncing a formula ! It is frequently the *pater-familias* who advises such repudiation, and his advice is often taken. Just as the marriage of the couple was arranged without their consent, their separation may be decided on, irrespective of their desire. The decision rests with the husband's parents. It follows that the relations between the couple are blended of two contradictory factors : *hostility* and *intimacy*.

As regards *hostility* : the relations of the one sex to the other, sexual relations regarded in the abstract, whether between the married or the unmarried, are in general based on opposition. This opposition usually and normally develops into hostility in the bosom of the family ; this hostility has an infinite variety of aspects and symptoms, notably the fact that the married couple live together as little as possible. Even if not an actual object of purchase, the woman was an object of bargaining and was always in a position of subjection and submission. Consequently she never enjoyed social relations of equality with her husband ; you might express it thus that familiarity between them was never realised or never consummated. Chamfort used to say that "commerce" between the sexes was like the haggling between explorers and savages ; always, that is to say, warlike trading. Even to-day this is true of the African household.<sup>1</sup>

There is, however, intimacy too, a combination of effort which creates community between husband and wife ; which leads on occasion to his consulting her in the decisions he is making. Just as in the family group as a whole the authority of the head of the family is shared, and brothers and sons have to be consulted, so that the family decision is a collective one, similarly in the married household. The wife is usually consulted ; her rôle is that of counsellor ; she is thus able to influence dealings and transactions. So true is this that the marriage rites visually symbolise to the public eye this intimacy, this partnership between the couple ; an intimacy, a partnership which is expressed in the Prophet's words : "Wives are your garment, and you are theirs." While on the one hand imaginary blows are exchanged between the two parties or their representatives in the nuptial ceremony, the same ritual symbolises the intimacy, the partnership on which the two are entering.

<sup>1</sup> [Another somewhat daring generalisation. EOL]

In Kabylia when the bride, riding a donkey or a mule, arrives at the bridegroom's house which she is to enter for the first time, she breaks an egg on the lintel of the door or on the hard head of her mount. This is to manifest to all eyes that she brings benediction and prosperity to the group she has newly joined. This is a sign of union, and a mark of affection from wife to husband. Sometimes too—and this I have myself seen!—the bridegroom perches himself close to the door on the terrace or the roof holding a broken reed in his hand. With this he makes a feint of dealing a few blows at his bride to mark the authority he is to have over her, but also to mark her initiation into the conjugal group and her acceptance into the family. Entering into the household she also enters her husband's family group, increasing its numbers by one; she thus comes under its sway, quitting one *manus* to find another. Not necessarily for her whole life, however! For it frequently happens that the wife will be repudiated and the new tie broken.

Such are the *feelings* of the couple. What of their *interests*? These are also ambiguous: at once separate and conjoint. The regulation of goods between the two shows at every turn these two contrasting traits. We find the interests of husband and wife now united, now opposed.

Amongst the goods which form the assets of the family in general, there are three recognised categories: *family* goods, *conjugal* goods, *personal* goods.

The essential *family* goods are the immovable properties, the houses and the fields which belong to the whole kinship group.

The *conjugal* goods are household articles, the control and disposal of which are in the husband's hands; they represent rights of a collective nature; goods which custom decrees that the *paterfamilias* should provide for his sons and grandsons, separate from and independent of the goods belonging to the parental group as a whole; they are in fact the *peculium* of the sons. They have their *origins*, their *objects* and their *effects*.

The primary sources of *origin* are, as in Roman law, gifts, earnings and legacies. These are the three means by which the son or grandson, while remaining subject to the authority of the *paterfamilias*, can nevertheless acquire possessions of his own which are then conjugal goods.

First come the *gifts* made to him: presents or donations, solemn or ritual gifts made in accordance with custom and

tradition. What a lot of them there are ! and how frequently they are made in African countries ! They are multiplied at the time of the wedding. Gifts are given to the bridal pair by the grandfather and father, by kinsmen, friends and neighbours that amount to a capital for the newly-married couple.

The second method by which the sons can accumulate assets of their own is by earnings. It is of course not possible for the son to earn while he still remains in the bosom of the family ; as long as he is still living in the family compound he can earn nothing on his own account, for any profit he makes belongs traditionally to the head of the family.

This then is a case where French intervention in colonial countries has had marked results. For it thus comes to pass that the son or grandson emigrates to a distance, moves off into a town and later perhaps even crosses the sea and comes to France to work in some French suburb. He thus makes money which is his own, his own private earnings and personal profits ; he acquires goods which do not belong to the family pool ; his wages are for himself alone.

This means the shattering of the family status, the dissolution of paternal power, brought about by the sons' or grandsons' emigration to European countries, which makes it possible for a man to acquire earnings and possessions of his own. An economy of exchange is thus established, and a purchasing power which has inevitably broken down the barrier that enclosed the family group. In olden days there was no custom of buying and selling between one family and another. But when the younger generation leave home, and earn, and learn to buy and sell, the habit of exchange grows up between family and family. The opportunity has come to acquire wealth by crossing the seas and thus to increase the quantity of conjugal possessions. So true is this that in Algeria the post office which was receiving the record number of money orders was Fort-National in the very heart of the Kabyle country. Hither flowed the savings of all the Kabyles who were working in France ; and these savings were not for parents or kinsmen—as of old they would have been—but for the worker's own household and children.

Lastly there are the *legacies*, in other words the rightful inheritance which falls traditionally to the share of all male descendants. In other days, as we have seen, the inheritance was not divided up. When the father or the eldest brother died no actual division of property took place. The family wealth remained undivided



and the children inherited no separate share. There was consequently no division of the family property by individual legacies to the several conjugal groups which composed the family group.

What do we see nowadays? Owing to French influence we find increasingly, especially during the last twenty years, division replacing non-division. On the death of the head of the family each of the children demands that his due share be allotted to him and the legacy which falls to him becomes conjugal property.

This disappearance—or better perhaps, the diminution—of the non-divided family inheritance, the play of successive atomised subdivisions, of the demand for individual instead of joint inheritance, has resulted in the creation of conjugal capital therefrom derived. In our own day we have even seen, though only very recently, amongst the North Africans, cases where the *pater-familias* has broken the old tradition by distributing the ancestral property in his own lifetime in accordance with French legal custom, which gives the father the right to divide his property amongst all his children. Such cases have occurred amongst the Kabyles of Algeria, which shows how contact with the French has tended to modify the traditions of old Berber law.

These conjugal rights have their *objects* as well as their sources of origin, and up to the present these have never been immovable properties. The first thing in which conjugal capital is usually invested is clothing; secondly and increasingly, ready money. It is hard cash which is spent and squandered in the *taoussas* to which the guests contribute gifts. This ready money is what the emigrant seeks who comes to France to work for wages. It is cash which emancipates the household!

The *results* of the possession of conjugal capital serve to underline the degree to which the conjugal group still remains subordinate to the family group. For the power of the conjugal group over its *peculium* is limited to the possession, exploitation or administration thereof, but almost never, at least up to the present, extends to the disposal thereof. What we might call the conjugal “property”—though in this context I do not like the word, for it is too precise—has only the one attribute of property but not the other. The couple have the *usus* but not the *abusus* of it; they may exploit, but not alienate nor dispose of, this money derived from gifts or earnings or legacies. As long as it is a question only of trifling purchases in the markets situate on the tribal frontiers where the husband goes to buy, and from which he must bring back some small “fairings” for

the wife who has remained at home, some inferior European trifle such as you see for sale in the African markets, as long as it is a question only of some insignificant expenditure of this kind, the husband is of course at liberty to spend his money. But if it becomes a question of an important purchase, if for instance he proposed to use a larger sum of money to acquire immovable property, it would be the duty of the family group as a whole to intervene, and of the father or the chief, as the case might be, to ratify the transaction in accordance with the opinion of the council of which we were speaking, the *concilium propinquorum* which is the assembly of all the heads of households comprised in the parental group. The implication is that this *peculium* ought to be preserved and ought not to be spent except in very minute quantities. The owner's enjoyment thereof is therefore always limited by tradition and family opinion.

Lastly, there are the *personal* possessions ; goods the right to which is individual not communal ; separate not shared like the conjugal possessions ; the private property of husband or wife. We meet these amongst the Africans, they are particularly conspicuous amongst the North Africans. Thus there is complexity and diversity in the system of kinships. It is not correct to say, as used to be said in earlier days, that there exist none but collective rights amongst these peoples and that unrestricted family communism prevails among them, for there are, as we see, distinct and separate conjugal rights, as well as distinct and separate personal rights deriving from personal acquisition, rights of the wife or of the husband. These last, like the conjugal rights, have their sources, their objects and their effects.

The essential thing in this case is their *source*. How do individual personal rights arise within the very bosom of the household ? As before, they may arise from *gifts* and from *earnings*, for there are both gifts and earnings which are personal and not conjugal. There are certain presents and certain profits which are reserved to one or other of the couple separately.

Certain *gifts* are traditionally intended for the sole benefit of the wife : private personal gifts peculiarly hers. First come the gifts made to her by the husband, more especially the dowry. Amongst the Algerian Berbers the dowry is provided half or in part by her family, and it is increasingly the custom that half or more is provided by the husband. Thus the dowry is more and more composed of two elements, the family share and the husband's share, both intended for the bride's benefit alone. In

Bantu lands things are different. There, the dowry is paid by the father to the father, no heed being given to the bride. In Berber countries certain gifts which are given on the consummation of the marriage, are traditionally enumerated and specified as being the bride's personal and private property. Such are ornaments, amulets and jewels to keep at bay the much-dreaded maleficence of the Jinns; perfumes also and toilet accessories, civet and jasmin; love philtres too which are always concealed at the bottom of the woman's bridal chest.

Very rarely, we must admit, there may also be *earnings*, private gains which the wife may acquire for her own personal benefit. She is sometimes able to earn a few pence by some personal work, some job specially reserved for women.

The *objects* on which these earnings of the wife are spent are personal, they are always movable articles: clothes, fowls, eggs or pottery, feminine, very feminine work.

The principal *effects* of these private possessions are more extensive than you might think. In Kabylia the woman is free not only to possess these things but to *lend*, to *give* or to *dispose* of them. These personal rights confer three privileges: the privilege of using, lending, or parting with.

Personal possessions can be *lent*—though only within the family—as we have seen certain articles of clothing lent, which were communal garments. So we find jewels lent from one household to another within the family circle. And these women's treasures may be parted with, but by no means in every case, far from it. Poultry, for instance, or pottery may be sold for the owner's private profit, but only if they are in excess of the family's own needs. The kinship group has, as it were, a lien or right of preemption on the produce of women's work. Only excess products may be sold outside the family. In the case of jewels and money, wives have probably only of recent times—I do not think the custom is an old one—been granted the right of disposal, where these things are the product of their personal earnings, where the jewels have been bought by the sale of eggs or poultry or where the money has been earned by their own labour. So if there is, to a certain extent, the right of disposal or *abusus* in respect of personal possessions, it is a restricted and exceptional right, which may only be exercised in particular cases and for particular reasons. Conjugal and personal possessions alike are always subordinate to the family, tradition forbids their being alienated to strangers.

Necessity apart, it is a moral duty to preserve them. The protective *genius* of the kin is frequently represented, as it was amongst both Romans and Greeks, by a serpent which is fed and which comes daily to the family hearth to seek its nourishment. There is a fear that the serpent will take vengeance if goods belonging to the family are sold ! The individual, though he possesses rights and brings in earnings, exists only in the *background and in semi-obscurity*.

## CHAPTER LV

### STATE AND FAMILY: INNOVATIONS

The portrait I have just drawn is intentionally limited to *general* features and omits those *particular* features peculiar to any given one of the overseas peoples. It therefore conveys the impression that in this system, which displays antiquity and stability in time, and identity and continuity in place, almost nothing should be touched in the interests of Order and Progress. In fundamentals—though by no means in details—its canons are the same in Senegal and the Sudan as in Algeria and Morocco. Thanks to this, Islam has been able profoundly to influence the Negro.

Hence the considered action of French legislators has not been directed in any radical fashion towards these general features. The aim has been to modify, but by no means to shatter kinship duty; paternal power; wifely duty or husband's power. It is by unperceived effects, by unplanned roundabout ways that the pillars of the ancient order have often been overthrown.

As has been said, in the Belgian Congo what was deliberately aimed at, in the name of "universal order", was the adaptation (whether by command or suggestion) of these traditions in their detail and in their particular features to a new canon of morality and utility such as we think should everywhere prevail where we bring "civilisation". This is, I admit, Spiritual Imperialism such as is exercised in a greater or lesser degree by all dominant peoples. It affects *family, marriage and household*.

. . . . .

The extended *family* imposed *duties* and implied *powers* which had to be curtailed.

What we may call *kinship duties*, attributes that is of kinship, as they existed amongst the more primitive peoples were frequently in European eyes shocking or injurious. Amongst the Australian aborigines it was a duty to eat the kinsman, sometimes the living, sometimes the dead, especially if he were an old man—the idea was not to waste the flesh and the fat!—and this was a religious duty. Now, under the French penal code such *endocannibalism* where it occurs, is a capital offence if it

involves the murder of a living person. There can be no doubt that *Public Order* demands that this should be so. Again, it was a duty—yes, a duty!—to *avenge* a kinsman by slaying his murderer to placate the dead man's spirit : this blood-feud still rages even in the Maghrib. Under French law this vengeance is murder and punishable by death . . . if the law is logically applied ! Again, there was the duty of *preserving* undivided and not alienating the landed property of the family : and especially the right, possessed in African countries by the kinsmen, of redeeming family land that had been alienated and of evicting the stranger in possession (ancient French law had recognised the same right). This is the *shifa'a* of Muslim and Berber law. It may hamper the development of the land, but it is not "contrary to Public Order" and it is a source of strength to the kindred : so the French have said : Leave it to Time.

Then there is a man's duty to *share* with his kinsman anything he earns. This bears hardly on the native emigrant who grows rich in France, is anything but disinterested, and naturally wants to keep his earnings. This problem is already causing serious conflict among the White Moroccans and the black Sudanese.—Another duty is that of *serving* the kinsman in all his doings, helping him devotedly and without reward to build his house or reap his harvest : what could be more admirable than such communal co-operation ?—Then if a kinsman appears before the Courts it is a duty to lie on his behalf since "my kinsman is always right". The *co-jurors* of Morocco exist to support, protect, and rally round the accused—not to give evidence ! It is not difficult to see that this practice conflicts with "the spirit of the Law" of the governing power. This is perjury, if the authorities are able to establish the fact—which very rarely occurs ! This is another case the cure for which must be left to Time.

It is a different matter when we come to the *patria potestas*,<sup>1</sup> which seems, in our eyes at least, excessive amongst the more backward peoples overseas. The right to *kill*, based often on "superstition", was recognised until quite recent times, especially the right to kill babies and the unborn : *infanticide* or *feticide*.—The gods used to be appeased by *collective* murder in the old days in Canada and recently still in Uganda ; similar murder of all infants born on an unlucky day was usual in Madagascar ;

<sup>1</sup> And in certain cases the *maternal power*, as amongst some of the *Moi* and *Sumatrans* and as a survival among the *Bantu*.

and in Tahiti the brotherhood of the Areoi (now extinct) used to murder every infant born. If certain signs are observed *individual* murder may be prescribed; amongst "primitive" peoples it is a common practice to murder twins or one of the pair, and in Benin the mother used to be murdered too! Sometimes the first-born son is murdered as being the herald of his father's death; and in the Belgian Congo an infant which cut its upper teeth before its lower ones was doomed; in New Guinea a baby whose mother died in giving it birth was also murdered; and finally in India, even to-day, girl-babies are murdered by the thousand! These things are crimes in the eyes of our law; and the murderers are prosecuted and condemned where possible—but it is not always possible! For in overseas countries—the law-giver is a preacher only!

Even in places where this right to slay—for a right it was—is no longer valid, in Madagascar, for instance, the right of *desertion* persisted; and in Annam there was an inveterate custom of *cession*: allowing the parents to "pawn" the child. One of my pupils, M. Dang-Trinh-Ky, has shown that the ancient Codes of his country had limited the practice. French decrees of 1883 and 1912 forbade such agreements, declaring the contract null and void because "immoral". This is a case where native tradition cannot be respected! Nor can the practise of indirect murder by *exposure* of the child be tolerated. Before the end of the 18th century infant exposure was forbidden by the local authority in Tong-King and in 1878 a decree of Queen Ranavalona II abolished it in Madagascar. There are in every country many respects in which the father is no longer the omnipotent *paterfamilias*.

So the new spirit does not regard family right as sacrosanct. We see that parental or paternal power has in some cases been *abrogated* and in some *limited* or lessened so as to temper and soften it, to adapt or adjust it. This very fact has frequently had the result—often without our suspecting it—of *dissolving* an ancient system or at least seriously weakening it and has thus contributed, as we know, to the depopulation of certain countries. However crude a system may be, it is a thing which inspires hope! Many other factors, however, besides *legislation*, have conspired to dissolve the power of the family—*Emigration* breaks the old ties: all the *navétanes*, the temporary labourers who, from the Sudan to Senegal, are hired for short periods to work, are freed from family bondage.—French *education* and sport

have a powerful effect on young men, reducing their willingness to submit.

The same spirit is increasingly at work in the *household* between husband and wife. First in the establishment of the new household, marriage procedure is far from having remained unchanged either in its method or in its implications. This is another flank on which the *patria potestas* is attacked.

Marriage *rites* or procedures amongst native peoples consist of a long series of actions, multiplied and prolonged, without culminating as in France at a precise moment where everything is sealed by one deliberate act. Agreement between the two families results from a succession of ceremonics duly performed in prescribed order. Nothing could be further removed from the French "solemnisation of marriage in the presence of the official Registrar". I shall show in a moment that the French have insisted that this official registration should be added to the customary ritual, which however is still respected, though here and there it has had to be somewhat modified and that for three reasons. Some of these rites were *disgusting* and dangerous to boot: the deflowering of the bride—by a third party! . . . Some were *offensive* and considered immoral: trial marriage, entered into for a short period only, used to be, if it is not still, customary, in French Indo-China, as it formerly was in Canada.—Some were extravagantly *costly*: these were the commonest of all, an organised debauch of present-giving and merry-making like the Algerian *taoussa*, of which I have first-hand experience, and which the French made every effort to restrain—in vain.

The *procuring* of a bride is becoming more and more difficult for the young husband on account of the necessity for finding the required money. It is better not to call this the "purchase price" or "bride price" but to say the "dowry", the *lobola* of the Bantus. The Muslims have an equivalent payment. This must be paid in cattle or cash by the bridegroom's father to the bride's, and this compulsory tax proves a serious obstacle to early marriage. The result is that the "old men"—whom we should call simply the mature men—the ones who can afford to pay, annex the marriageable women, and their monopoly is scarcely questioned: this reacts most injuriously on the birthrate. Late marriage and even bachelorhood are common. Europeans have long fought against this. In Sumatra in 1846 and 1862 the Dutch forbade this *jujur* marriage and in the course of their



rule the English have forbidden *ambilanak*, the custom according to which the young husband lives in his wife's home. Wilken, however, admits that these customs still survive. In the Belgian Congo a *limit* has been placed on the *lobola*, but it would seem that this is disregarded. It has occasionally happened that the more advanced, more enlightened, natives have themselves sought to assist in these aims. The notables of Saint-Louis du Senegal agreed in 1930 that the "dowry" should be fixed at five hundred or a thousand francs, according as the bride was a widow or a girl, and that wasteful expenditure, ministering only to vanity, should be severely restricted. This was a hopeful gesture, but it remains so far an isolated one. The earnings of those workers who leave home, especially for the cities where wages are increasingly to be found, have caused a rise in the size of the "dowry". In Negro countries Progress spells a rise in the cost of living.

Some people would like to see not only *local marriage* but the *French marriage* introduced, as it was in Cochin China, but only there, by the codified *Précis* of Cochin China law of 1883. Others would like to see *Christian marriage* legalised for the convenience and security of converts. This is not so far recognised by the French legal system.

It is however the *circumstances* of local marriage which have caused the rulers to alter the customary law, especially in respect of the *age* at which the contracting parties may marry, or rather the age at which marriage may be arranged *for* them *by* their families. This is the problem of *child marriage*, with or without consummation, which has been acute in India for a century or more, and which has stirred foreign and even "native" opinion. This has made it easier for the French to legislate in the matter, but not necessarily with much more effect. As early as 1890 a great Indian reformer, Malabari, pleaded for something to be done: and a law of 1892 forbade the consummation of marriage with a girl under twelve years of age. Various Indian rajahs, like those of Mysore and Baroda, had on their own initiative forbidden marriages between children under eight and nine years! The Sarda Act of 1929 forbade the marriage of a boy under eighteen or of a girl under fourteen. Prior to that, ten per cent of girls were married before ten and more than half of all girls were married under fifteen. Customs of *religion* and of *caste* were responsible for these abuses. This was one of the cases where native public opinion, sedulously educated by writings

and exhortations, allowed the law to be passed without protest. So in French India a wish expressed in 1936 by the General Council—a body of Indians with French citizenship—led to a decree of 1937 which fixed sixteen as the minimum age for a boy's marriage and fourteen for a girl's. Defiance of this decree involved a fine and imprisonment for the parents and for the "celebrant". In exceptional cases for "serious reasons" the Governor has power to grant a dispensation. In French Africa the law of 1930—of which I have in another place spoken at length—fixed the age of fifteen as a minimum for both parties in Kabylia, though in certain specified cases a dispensation might be granted. In the Belgian Congo a decree of 1936 forbids a boy and girl to "cohabit" under the age of fourteen. An order in the same sense was made in the Cameroons in 1934, followed by a decree in 1939. In the same year a minimum age of sixteen and fourteen for boys and girls respectively was fixed for the whole of French West and Equatorial Africa, but here the authorities went further and demanded the *consent* of the young couple. This was a radical step marking a complete break with tradition: in Africa marriage is a union between *families* and not between *persons*; until now, the kinsmen not the bride and groom have been in control of the marriage and will probably retain control except in the towns.<sup>1</sup> Kabyle experience during more than ten years is there to prove it: the failure cannot be disputed. For the Muslim Arab the right of *jabr* is a matter of religion and must not be tampered with—except by such indirect roundabout methods as I have described elsewhere—the father marries off his daughter and his son without any question of their consent.

It is in regard to the *bond* of kinship between related families that French legislators in colonial countries have thought that they both *could* and *ought* to take action. Two separate questions are involved. *Endogamous-incest* has practically ceased to exist; the *pirrauru* or group marriage of the Australian aborigines has died out with them. Marriage of nephew and aunt is still practised in Negro countries. It is, however, the *levirate* which has distressed the reformers: the obligation—or at least the option—possessed by one of the brothers of a dead man to compel the widow to marry him. This is a crime against the

<sup>1</sup> I called the attention of the Supreme Council of Overseas France (*Conseil supérieur de la France d'Outre-mer*) to this point—in vain—when the reform was there discussed in 1939.

unfortunate widows, already so cruelly treated amongst backward peoples,<sup>1</sup> considered as defiled, in some cases secluded for the rest of their lives, in others forbidden to marry again since they are still the property of the deceased husband. The Queen of Madagascar abolished the levirate in 1881. The Algerian Court of Appeal in a famous judgment of 1908 declared it null and void. In French India, where it is deeply rooted, it was tempered and softened, though not abrogated, in 1906.

Changes, whether imposed or only proposed, have taken place in marriage customs in the French colonies. It is necessary for us to follow these experiments in their practical application, objectively and not with passion—so often brought to bear on the subject!—and observe their failure or success. It is an interesting subject for enquiry! More advanced or better adapted peoples have “modernised” more lavishly. Only yesterday Syria introduced the *pre-nuptial medical examination* and a doctor’s certificate is to be produced before the marriage Registrar. I do not know whether this has been put in force.

It is, however, the married *household* founded on a legal union which has stirred the passions of reformers male and female. Two points in particular rouse anxiety and excitement: the *plurality* of legal wives and the *authority* of the head of the house. On these points in an advanced country—and that oddly, in Muslim countries—the Native has acted in concert with the European, and has sometimes even urged him to greater speed so as to achieve quicker results. For in such countries the Native *wants* to be reformed or, better still, wants to reform himself. The subject is an immense one and as far as Algeria goes I have discussed it elsewhere.

There are two aspects of *polygamy*, or *plurality*: polyandry and polygyny: several husbands for one wife, or several wives for one husband. It is inaccurate to apply the term “polygamy” to the second case—as is commonly the custom.

Even in French India I do not think that polyandry has completely disappeared, though the deeply-bronzed “citizens” known as “renouncers”, have, as their name implies, been compelled to renounce their ancient system. The native ruler Tippoo Sahib had in 1788 limited the number of legitimate

<sup>1</sup> [The Hindus would no doubt resent being classed as “backward”, but their attitude to widows is to the western mind shocking and painful in the extreme. EOL]

husbands to ten. That was the ceiling ! Polyandry has been dying out in proportion as female infanticide has ceased, for this was one of the primary reasons for polyandry. Remove the *cause*, where possible : that is the golden rule which French legislators tend to overlook. This demands taking counsel : a thing little to a legislator's taste.

*Polygyny* is much more widespread and more varied in its forms. It is *sororal* where the wives of the husband are sisters, as in Annam. It is *hierarchic* where each wife holds a different rank. In Muslim law all the wives are equal. In Tong-King and Japanese law this is not the case ; one holds the rank of Chief Wife. Again, polygyny may be *successive* when the husband may change his wife, but is entitled to only one at a time. It is *limited* amongst advanced peoples : a Musulman may have four wives only<sup>1</sup> ; amongst backward peoples the number is unlimited. The Bantu Negroes are much addicted to polygyny : the Chief whom Clapperton met at Kong in 1825 said he had two thousand wives in his harem ! In such cases nothing now has power to shock a European, man or woman, nor to hurt a missionary's feelings ; they have fought against the practice with all their might. French legislators have flung themselves into the fray : in all French countries monogamy is an article of "Public Order" and bigamy is accounted a serious crime. If their efforts have not been crowned with the success they could have wished, it is because the *reasons* which bind backward peoples to polygyny are still strongly operative. There is the question of *work*, for in these countries women provide the labour ; of *power*, for the marriage tie binds chief to chief ; of *pride*, for a number of wives gives opportunity for a display of vanity. There is also the question of the *taboo* on cohabitation with a pregnant woman or a nursing mother, and the nursing period often lasts two years !<sup>2</sup> Finally it is every man's *duty* to have as many children as ever he can and to band them together in a compact flock for the vendetta. These are the obstacles against which all attempts to abolish plural marriage have failed.

It has sometimes occurred that those interested have spontaneously and *freely given up* the ancient custom, partly influenced

<sup>1</sup> [But he can change them as often as he likes, if he can afford it. The great Ibn Sa'ud of Arabia, a most devout Muslim, is credited with having had at least two hundred or thereabouts. EOL]

<sup>2</sup> [This should be no matter for surprise. In such countries, artificial baby foods are not available. EOL]

by the advice of reformers and partly driven by the necessities of the modern world. An Egyptian "bourgeois", even if he is very wealthy, will take one wife only—this has long been so—he would be scorned and almost ostracised if he did otherwise. On this point public opinion is firm in this long-Europeanised land. In French Algeria polygyny is greatly decreasing because of high prices which continue to rise and rise : for the wise Prophet laid it down that a husband should provide separate living quarters for each wife ! Four wives—four sets of quarters in one house ! Such an arrangement nowadays becomes less and less possible. The 1936 census, which we may take to be reasonably reliable, makes the circumstances clear. The drift towards the towns will in time have the same effect. The *tribe* maintains polygyny ; the *town* on the other hand tends to hamper it.

Nevertheless the *compulsory abandonment*, enforced by legislation, has been preached and applied. Some native kings were set on it. Polygyny was forbidden in 1878 by the native ruler of Madagascar, and again in 1881 by Article 50 of the Code of 305 Articles—which is still in force to-day. The prohibition, as is frankly admitted, had very little effect. Earlier still, the Protestant missionaries in the South Seas drew up Codes which always forbade polygyny : in Tahiti, for instance, and in Hawaii. Lay authority was more discreet and has remained so. In 1524 Hernando Cortes conceived the project—which was not carried into effect—of putting a legal term to polygyny in Mexico. In 1890 the Republic of the United States passed a law forbidding the Amerindians to have several wives. Quite recently the Belgian Congo has devised a method as ingenious as it is remunerative. It is to impose a *supercapitation* tax on the husband for each wife after the first : the tax is progressive, increasing with each additional wife, thus taxing wives as . . . objects of luxury. The idea is to discourage rather than to forbid : we must await the result.

The husband's authority in the household gives a sentimental shock to the European ruler. The wife is a being *not-pure*, and at times *impure*, and stands to her husband in a relation varying between profane and sacred. Religion enforces her submission to him as that of a non-initiate to an initiate. The "cruel" treatment of which the wife is the victim is a matter of "superstition". Education should in the course of time remedy this. If the people of Guiana believe that the woman must at times

be purified by being bitten by ants, the problem is "psychological".<sup>1</sup> Similarly, in other places women are flogged . . . to fertilise the fields; the Romans also believed that fertility was promoted by flagellation! *Marital authority* as it at present exists overseas, both amongst backward and advanced peoples, is less tempered—vastly less—than it is in France. To make matters worse, the wife, having entered her husband's family, and having become an integral part of his agnate group, to whom she is bound by community of domicile, is subjected to the authority of her mother-in-law, who rules her son's wives, as the bride's father-in-law rules the sons. Marriage for her is no liberation: she merely passes from *manus* to *manus*. It would be wrong for us to interpret marriage as a purchase, and to consider the wife merely a chattel. We should be importing clear-cut conceptions into a confused complex of ideas, and ignoring the profound *chiaroscuro* of the notions and regulations of customary law. Let us rather put it thus: on entering the new kinship, the wife becomes, like the daughter of the house, amenable to the sacred authority of the new group. Now, the compact, close-knit kinship is becoming ever increasingly loosened up, not only in the towns, but also in the tribal areas. The reason is that the French Peace makes it possible for a household to live safely in isolation even in the depth of the desert; there is no longer the risk of its running into danger by separating itself from the group of its kindred which in olden times afforded a necessary protection. The young couple's desire for freedom, increased by contact with white men in the towns, may now safely be satisfied, as it would be in France. The security which the French have established has greatly contributed to the dislocation of the community. This is an advantage and at the same time a disadvantage—which serves to show how difficult the problem is!

As things stand at present, with the community still persisting, there are two characteristic features of the conjugal group which are shocking to us: *inequality* and *instability*. The inequality is very marked: the wife is subordinate, she is a servant; she is over-burdened and humiliated, and in contact with French people she becomes aware of the fact. Amongst the Moi of Upper Annam I have seen the wife eating her husband's flies! Did she feel aggrieved? <sup>2</sup> I am not sure. The remedy lies in

<sup>1</sup> [As is the retention by the Church of England of the service for the "Churching of Women" after childbirth—though this is happily falling into increasing disuse. EOL]

<sup>2</sup> [But among the Trobriand islanders Malinowski reports that the eating of each other's lice is a recognised and apparently gratifying phase of courtship between lovers. EOL]

the lap of Time. Moi schools have already been started ; Moi battalions have mustered, in which tribes that once were enemies have been mixed and blended into a single corps. The Moi man will change, and through him the women.—The great evil is the *instability*. The man belongs first and foremost to his kin ; only in the second place to his own household : the wife planted down amongst his kinsmen is a changing thing. She is often repudiated, especially if she is childless—the Malays are afraid that her sterility may infect the fields. In such cases she is cast out : to return, perhaps, to her own kinsfolk ; she disappears and is forgotten. She has little right to divorce her husband. Adultery is therefore very common, especially amongst the Negroes. It is said that the Lobi of the Sudan have only one word to denote “marriage” and “free liaison”. The conjugal group, being subordinate to the kindred group, cannot be stable and secure.

By what means can it be consolidated ? The usual two : education and legislation. Simple contact supplies the *education* : which produces speedier results than you would think ! “Feminism” has made its appearance in the towns : in Tong-King I have seen the wives of “notables” appear in public before the stranger. The Tong-King Code, moreover, has abrogated repudiation. Daghestani tells us that in Syria paying compliments is all the fashion ! The tribes, however, are still a long way off this stage ! Here *legislation* may be of use ; but great caution and discretion will be necessary to overcome resistance and opposition. Some Maoris, on whom the missionaries tried to impose monogamy, took to flight and defying the hazards of the long journey fetched up with the Mormons ! The way to improve the lot of coloured women will be to set up *centres free from customary law*, as they have done in the Belgian Congo. Heavy-footed laws, stern and inflexible, would inevitably prove futile. There is one case only where a law was essential : the case of *sati* (often spelt in the old-fashioned English way *suttee*) : the duty, or at least the impulse of the Hindu widow to fling herself to perish on her husband’s funeral pyre. In the *Suppliant Women* of Euripides, Evadne widow of Capaneus, one of the seven Argive chieftains slain before Thebes, flings herself, dressed in all her festal robes, on her husband’s pyre. Such was the Hindu custom in India, and it is also met with in Malaya, in China and Japan, and as far afield as America. Albuquerque abolished *sati* in Goa. Even the English felt compelled to stop

this cruelty amongst the Hindus, first by a decree of 1829 and then by the Penal Code of 1860. Amongst remote tribes cases of *sati* have nevertheless been reported as recently as 1929. For us it is just murder : nothing else and nothing less, even if the widow consents.<sup>1</sup>

The subject on which French legislators have felt bound to reform—or rather, innovate—family custom is : *registration*. They must have record of what is certain, proved and accurate fact : they want to specify, distinguish, and certify. For the sake of *order*, they must define the *individual*, his age, sex and social status ; and in order to differentiate him they must give him a personal *name*. The *identity* of the individual is in the French colonies a French invention.

Amongst backward peoples there is nothing comparable to this.

A person's age is always indeterminate—I have noted this elsewhere—he can make only an approximate estimate. "I was born before, or after, such and such an event," he will say. The *name* in particular is never distinctive. The elders of the family preserve the *genealogies* in their mind, and transmit the memory orally from generation to generation, but these genealogies are unpractical in modern relations with individual natives. For these relations are between man and man, not between group and group. The names in use among the natives of the French colonies do not serve specifically to identify the individual. Very often they are *oral* only and not written, for many of these peoples have no writing—often they are *common* names regulated by the classificatory system of the kinship. The Dogon of the Sudan use the same word for father and uncle ; in other places, brothers are not distinguished from sisters, both bear the same name. Amongst the Kiwai of New Guinea a boy must bear his grandfather's name, for he is believed to be the reincarnation of the ancestral soul. The same thing holds for the Kabyles of Algeria. This is a source of confusion both for the government and for the private person when dealing with a native. Amongst the Muslim Arabs the father's name passes to the son as a sort of "christian name" ill-calculated to distinguish the bearer : Muhammad Muhammad or Muhammad Ahmad : many men in every place are so called. Then

<sup>1</sup> [A moving account of the widow's passionate desire to pay this last tribute of affection and respect to her husband, will be found in C. J. Griffiths, *The British in India* (1947). EOL]



there are cases where the names *change* according to the various stages or vicissitudes of the person's life. In Sumatra this name-changing is a positive plague. The father may change his name on the birth of his son : sometimes he even adopts the boy's name with a prefix denoting paternity. He and all his kinsmen change their names when a son dies, so that the dead man's spirit may not compel them to follow him if he calls them. In case of illness, the same idea prompts them to play a similar trick on a malevolent spirit by taking the name of a lucky kinsman. Throughout the Malayo-Polynesian world a man will change his name to adopt that of a new friend. Our sailors in the early days of contact practised this *exchange* and *addition* of names. Again, a man may be called by different names by the various groups of which he forms a part. On the accession of a new king in Tahiti, all the chiefs changed their names and a proportion of their vocabulary too. Vancouver used to say : "How difficult for a stranger ! " How could you keep in touch with a Proteus ? So you see that in setting up a system of registration (*état civil*) you at once come up against age-old traditions often interwoven with "superstition". I have spoken about Algeria in this connection and have recalled the ancient taboo against a census. "The wolf devours the counted sheep"—Give a man a name, and the Spirit will seize him ! Some native rulers of advanced overseas countries had made efforts to organise a system of registration with its corollary, a census : if you want to count people, you must name them. The Land Register of the Empire of Annam, which was known as *dia-bo*, was primarily a register of lands, and for the purpose of land-registration account was taken of *adult males* only. Women and children were neither named nor counted. This was the defect of all early censuses. Where such registers were drawn up in Islamic countries who would have dared venture into the houses to enquire about women and children ? This would have been a crime in the eyes of all True Believers.

Setting up a system of registration is therefore no easy task, though it has long been contemplated. A decree of 1773 in San Domingo forbade any person of colour to adopt a white man's name, as the people were in the habit of doing. We all know that they have kept these names. Proper registers were established in the Antilles in 1828. But it was only very recently that a system of registration *imposed* by the French in Africa, and backed by necessary *penalties*, was firmly established.

I have elsewhere pointed out that in Algeria repeated attempts had to be made before the passive resistance of the populations could be overcome. Since the Laws of 1930 and 1934 the announcement of births and deaths and their entry in an *ad hoc* Register is obligatory ; and not only this, but the registration of any definite repudiation must be entered in the margin of the birth certificate. All these entries must be in French, and the husband who omits to make them is liable to fine and imprisonment. In Indo-China too the registration of births, marriages and deaths is compulsory. As early as 1886 in Tunisia and since 1915 in Morocco *voluntary* registration was more prudently introduced thus gradually creating Registrars' Offices in urban and tribal areas. In Tunisia a start was made in the capital by a procedure of invitation, the chiefs of each quarter doing propaganda for an institution whose advantages were very quickly perceived by these intelligent people. In 1908 the registration of births and deaths was made obligatory throughout the French Regency ; and in 1925 a decree of the Bey permitted Muslim and Jewish natives to *demand* that they should be given a family surname, which implied also the assignment to them of a personal first name as well. In Tong-King an imperial rescript of 1935 required an order of the Resident before a man was permitted to change his name.

These things brought about a transfer of the *oral* into the *written* word, of the memorised into the inscribed record. This is the nature of the change brought about by the State ; which installs *archives* equipped with *registers* to enumerate the population and preserve people's rights ; to inscribe on paper facts formerly recorded on brick or textile concerning men's affiliations and circumstances ; to identify and determine men and possessions. This connoted a radical change amongst even the most advanced inhabitants of the overseas countries. Amongst other results it opened up a career to the *individual*, the owner of goods and the possessor of rights. In which connection the introduction of an *identity card* has already been proposed or carried out. The security provided by these "titles" ("*actes*") of official registration carries with it security for a man's personal interests. Each individual has now his own domicile and his own affairs. Precision having superseded vagueness, each can disentangle himself from the meshes of collective rights always uncertain and undefined : ill-delimited and ill-corroborated, since they rest only on tradition and not on definite agreement or contract.

To define, to clarify, to guarantee, to limit, is, at the same time to confer personality. Thus the State rescues the individual from the community.

We are therefore justified in claiming that the *State* is in one sense *State Registration* (*l'État . . . , c'est l'État-civil*).

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## REGISTRATION OF VITAL STATISTICS

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STATE AND SOCIAL STATUS <sup>1</sup>

Since the State in a legal sense implies the establishment of a Common Territorial Law, it inevitably clashes with the legal customs of the original inhabitants of a colony. This is all the more the case since in the course of time a second result of the change follows the first. By introducing the State, the French invent, or, if you prefer it, release the *individual*: another great achievement, a new and radical change. They extricate the individual from the family group and from the tribal group; they give him opportunities and ambitions; they separate him, consecrate him, and confer distinction on him. They increasingly expect him to take part, as an individual, in discussions and decisions which in former times were imposed on him by the common will. Set free by them, pushed into the foreground according to the spirit of French law, the individual steps on to the stage, sometimes without either realising or desiring it. This is a second consequence inherent in the first, and even more far-reaching.

The conflict involved in the question of personal status is complicated and aggravated by another phenomenon: the clash of the State with the associations which exist in overseas countries, particularly in Muslim countries.

The groupings which I am calling *associations* are very different from those of a family type: from tribe, family and household: very possibly they are less ancient.—There are first the grades (*castes*) <sup>1</sup> or ranks, the hierarchic divisions of the people, one division superposed on the other. The French have frequently destroyed these distinctions, first by creating the State, and secondly by emancipating the individual. The *craft guilds* (*corps de métiers*) and the *brotherhoods* (*confréries*), which have in some places been weakened and in some abolished, have been in many countries replaced by new groupings, hitherto unknown “*cadres*” which the old inhabitants had never heard of: trade unions, mutual insurance and credit societies, in which the inhabitants

<sup>1</sup> [I avoid here using the word *caste*, because in English we confine it almost entirely to the Hindu system of India, with the Brahmin at one end of the scale and the Untouchable at the other. There is no such thing as *caste* in that sense in Islam nor, I believe, outside Hindu India. EOL]

are either voluntarily or compulsorily enrolled; especially vocational trade unions, in the French sense, and organised according to French law, which the natives have increasingly learned to join. None of these new associations have anything to do with kinship, with status or with rank. They are from many points of view voluntary groupings which a man joins of his own free choice without being compelled by duty or tradition.

Let us first discuss *grades* and *ranks*.

The division of these native peoples into grades and ranks is a very common phenomenon; hierarchic strata rigorously superposed one above the other. People have spoken, especially in relation to India, of a cascade of contempt and disgust from the heights to the depths. These grades and ranks to which their subjects were formerly accustomed, and which they were of old wont to respect, have been very deliberately attacked by the French wherever their subdivisions were too sharply defined, and thus offended against French ideas of liberty, dignity and equality, and imposed too marked a degree of degradation on the lower ranks. The French Colonial Empire has been particularly concerned with the status of three elements of the population: *captives*, *pariahs* and *half-breeds*.

By *captives* I do not mean the old-time slaves, whose slave-status was abolished in 1848, but the "household captives" (*captifs de case*) as they are called in the French Sudan, who are sometimes still retained under both the English and the French. They are chiefly former prisoners, considered as persons, not as chattels, who have remained as servants or retainers of their conquerors. They are not usually illtreated, but according to ancient custom they are adopted into the family groups, are received as kinsmen or semi-kinsmen, and live as such amongst the kindred. The French could not acquiesce in their continued captivity since it is an infringement of and the very negation of liberty, for it runs counter to the right recognised by French law of every individual to move if he wishes. In French West Africa, captivity has been got rid of not by solemn decrees and laws but by circulars and orders. It was not until 1901 that Governor Ponty's Sudan circular was published in French West Africa; its effect was then extended to the whole Federation by a circular of 1909. By these measures captivity was abolished, and all inhabitants were forbidden to possess or retain these "household captives" and deprive them of their liberty—well treated though they usually were.

It happened, however, as it so often happens, that marked difficulty was at once encountered. Abolition had been by law decreed, but not in practise achieved, at least in certain quarters. Even to-day, if you keep your eyes open, you will find household captives perfectly resigned and contentedly acquiescing in their position.

The first reason why this abolition aroused resistance against the French authorities was that the holders of such captives were the notables and *marabuts*. The *marabuts* in the first place ; they are the purveyors of greegrees<sup>1</sup> and vendors of magic medicines, and for them the household captive was a useful worker and a valuable customer. Whole tribes were engaged in trading in these retainers : the Saracoles, for instance, had formerly been slave traders and had then turned their attention to the trade in captives. The abolition of captivity therefore threatened to cost them their profits. The circular however was uncompromising. It forbade the Courts, whether Muslim or French, to entertain any claims lodged by the " owners " against captives who had fled ; it also insisted—the date is worth noting—that natives should be treated as human beings, implying that the captives were to enjoy dignity as well as liberty. The wording of this decision was unmistakable : it set out to fight against " barbarous customs " and thus to weaken the excessive power of those *grandees* whose prestige and authority were founded on the large number of captives they possessed.

So captivity disappeared in Senegal and the Sudan ; in time it became extinct, when the sources of supply dried up and its causes were removed by the establishment of the French Peace, for the captives had been mainly prisoners of war. By preventing fighting between tribes and between chiefs or kings, the French had got rid of the chief reason for captivity. If some captives nowadays still remain it cannot be for long.

The French were compelled to intervene in the case of *pariahs* also, but so far without decisive success. The circumstances are different, we shall now define them.

As in French and English India, the pariah is an inferior human being, a despised person, the most despised of all, at the very bottom of the social scale. In Ceylon the pariahs are called *rodīs* and are cut off from the world of the living by the weight of contempt with which they are laden. This contempt is expressed in age-old, deep-rooted taboos, which oppress them

<sup>1</sup> [West African charms and amulets. EOL]



and prevent their ever making contact with men of other castes. There must be no "question of contact" nor question of intercourse; Hindu caste forbids all human relationships or converse. The pariahs are not permitted to eat with others or to trade with others—to converse or to do business with others—nor ever, and this is particularly important, to intermarry with others. To use the vocabulary of the Ancient Romans, these unfortunates labour under three taboos: those of *mensalium*, *commercium* and *connubium*. The *mensalium* is the taboo of eating together; the *commercium* of trading together, the *connubium* of marrying together. No union either in law or in practise is permitted between the pariah and the non-pariah. In French the word pariah has acquired the meaning of outlaw, a person placed "outside the law".

Such was the position of the pariahs. For a hundred years or more neither the English nor the French took the trouble to try to ameliorate their status.<sup>1</sup> Changed conditions in India were necessary to invite reconsideration of the position: first the arrival in the great cities with their millions of inhabitants of people from the villages, and then the rise of Big Industry in India. These two factors, with many others, have inevitably raised the question of improving the Outcaste's status.

The abject position of the impure pariah, whom a man of higher caste could not touch without being contaminated, could not be maintained amid the elbowing crowds of the city. In Calcutta and Bombay whole large many-storeyed houses had to be abandoned because Outcastes had taken up their quarters on the higher floors and their mere presence had mystically contaminated the water supply! It was not easy to preserve the ancient taboos in the crowded conditions of giant cities which soared skywards! The contagion of new ideas also played its part. For the last fifty years there has been a perceptible movement amongst the Hindus to improve the lot of their Outcastes. This lot is contrary to French "Public Order", it guarantees neither the dignity nor the security which the French feel they owe to all the inhabitants of their colonies. It insults the pariah's dignity since he is irremediably despised, and people avert their

<sup>1</sup> [This is scarcely correct. The British have on principle always refrained from interfering in matters of religion, and the caste system—odious though it is in our eyes—is an integral part of the Hindu religion. But in British hospitals and Law Courts the Outcaste and the Brahmin have always received exactly equal treatment. This example has not been without effect, and the more enlightened Hindu is now endeavouring to reform Hindu society on better lines. The road will be long. See J. H. Hutton, *Caste in India*, 1946. EOL]

eyes if they see him ; if you even look at him you run the risk of being contaminated. Human dignity demanded that the pariah child should be free to attend the French schools. This was not the case at first, because all the children of higher rank would have fled if a pariah had entered the school building.

Security or safety was also in question since according to the traditions there were cases where Outcastes might be killed, cases where at least they used to die of hunger during the frequently recurring famines in India because of the neglect they suffered on account of the contempt in which they were held, for the Hindus would not permit even the cheapest vessel, of pottery perhaps, of the coarsest workmanship, to be used by any member of another caste if it had been used by an Untouchable. In 1874 it happened amongst the Santals of North India that many pariahs were abandoned to die of hunger : to give them aid would have been to touch them !

In India there are some sixty millions <sup>1</sup> of these Outcastes in English and French territory, a number equal or almost equal to the population of the whole French Colonial Empire. There has been joint action by English, French and Hindus in the matter.

Little inclined as the English notoriously are to feel anxiety about the condition of "coloured people",<sup>2</sup> they have nevertheless changed the status of the Outcaste. First probably from mere ignorance and misunderstanding of customary law ; but also no doubt in course of time with deliberate intention and desire.

In laying out the railways, for instance, there was no question of reserving, as was done elsewhere, special places or special carriages for all these Outcastes. The natives were therefore mixed together in the carriages generally reserved for natives in the colonies. The 4th Class—an extra class—mixed all natives together without distinction, and in it the Outcaste was as much entitled to travel as the Brahmin or the Kshatriya. There may have been protests at the beginning, but in the course of time the fact was accepted that the Outcaste could enter railway carriages.<sup>3</sup>

<sup>1</sup> [Hutton's estimate of their numbers is 50,195,000, *op. cit.* EOL]

<sup>2</sup> [Professor Maunier's anti-British bias keeps obtruding into his text. The English reader with any knowledge of British history will be more amused than irritated. EOL]

<sup>3</sup> [There never has been a "4th Class" on the railways of British India. In the 3rd Class, special carriages are reserved for Europeans and persons of mixed European and Asiatic blood (who till recently were styled "Eurasians" but by their

In the schools the English laid it down in 1854 that the Outcastes should be admitted and should sit on the same benches as all other Indians. As regards the right of natives to perform public duties or enter public employment, the English have made no distinction of rank or caste. Admission is competitive and is open to all Indians alike, and Outcastes have been freely permitted to compete. They have thus had access to government employment; if they rose and if they made progress they acquired authority over Hindus<sup>1</sup> of higher caste. This has overturned and upset the caste hierarchy—without this consequence having been, as it seems to me, foreseen, at least at the start. Nevertheless no heed has been paid to the protests raised by the caste-Hindus who objected to having contact with Outcastes.

During the last fifty, and especially the last thirty years, the Hindus themselves have intervened in the interest of these disinherited people whom the Indians call "untouchables", a word which well describes the fact that these Outcastes have not the common right to normal human relations, were it only the contact of a simple meeting or of an accidental interview. Enlightened Hindus are taking thought to improve the Outcastes' lot. These pariahs themselves have plucked up courage enough to form associations and unions amongst themselves to demand a better fate. The new spirit has penetrated the ranks even of these tragic and rejected people. In the North of India too, rajahs and maharajahs, these local sovereigns anomalously under the protection of the English Government of India, roused or shaken by the campaigns of the Hindu "intellectuals", have deigned to accord privileges to the Outcastes: particularly to recognise their right to live in the same quarters as those of other castes, to give them access to offices and schools, and often to take them into service inside their palaces! A stirring of Hindu opinion is manifesting itself in the Native States heralded by Mahatma Gandhi. He struggled for more than twenty years, bitterly but not without success, to insist that the Untouch-

own desire are now—much less accurately—known as "Anglo-Indians"), as in England special carriages are reserved for Ladies Only and Non-Smokers. The fact is that any Indian who could and cared to pay the fare has always been entitled to travel First or Second Class. There never was a question of all "natives" being indiscriminately herded into 3rd Class carriages. EOL]

<sup>1</sup> [Professor Maumier habitually uses the word "Hindou" for *Indian* as well as for *Hindu*. He even speaks in one passage of a Muslim Hindu (*un hindou musulman*)! In my renderings I have tried to reduce the consequent ambiguity, but I may sometimes have misinterpreted his intention. EOL]

able should no longer be despised, outlawed and treated like a leper.

The influence of the Missions, first the Roman Catholic and later the Protestant Missions, has long worked in the same direction. Since the time of Saint Francis Xavier the Roman Church has not ceased to work for the uplift of these disinherited people, though it has often been compelled, in order to survive and continue its work of conversion, to make concessions to prejudice and deal tenderly with tradition. For a long time Roman Catholic churches were built with two naves, one of which was for Outcastes. The Church was also obliged—I am not sure that this custom may not still exist, at least in certain places, down to the present day—to administer the Eucharist separately, giving it first to the higher castes and then to the lower, since the former would never, even on such an occasion, risk accidental contact with the Outcastes.

This being so, the Church had to give way, at least in the beginning. In the collection of Edifying Letters<sup>1</sup> of 1700 we read that in certain regions of India the missionaries had to abandon all hope of converting the natives, because the earliest converts were Outcastes and hence the very thought of conversion roused horror amongst those of higher rank!

In these circumstances the French dare not dream of legislating openly, and publicly abrogating by law or by decree all the taboos affecting pariahs, particularly the prohibition of marriage with a non-pariah. What they did do in their towns in India<sup>2</sup> was to declare all natives either electors or citizens. The citizens are "renouncers" (*renonçants*) who have renounced their customary law. In either case, whether a native is an elector or a citizen, no distinction has been made between Caste-Hindus and Outcastes. All the native inhabitants of French India are electors, and many of them by renouncing their old system of customary law have become citizens. The French have established equality between all on the plane of public but not on the plane of private law.<sup>3</sup>

<sup>1</sup> *Lettres édifiantes*

<sup>2</sup> [French possessions in India are scattered colonies. The chief towns are Pondicherry on the Hoogly, north of Calcutta, Karikal and Mahe on the east coast and Yanam on the west coast. The total area of French India is 203 square miles and the population in 1936 was estimated at 203,000, of whom some 92 per cent. are Hindus. The position of the French colonies in India after the British withdrawal will be interesting. LOL]

<sup>3</sup> A decree of June 16, 1937, has suppressed all mention of the parties' caste in public documents and registrations

A decree of 1898 in Madagascar—up to the present an isolated case—issued by General Galliéni, has abolished the prohibition against “mismarriages” between persons of different social strata. For the Hovas of the High Plateaux had very clear-cut social distinctions, and marriage between the different ranks was forbidden by tradition. I am not sure that the prohibition has not survived all the same. In Indo-China too the prohibition against intermarriage between different ranks has been abrogated.

After captives and pariahs, the position of the *half-breeds* shows the great conflict that has arisen in the French colonies between the State and the grades or ranks. For a long time under the Old Régime the French did not interfere with the status of the “person of mixed blood” as the half-breed was called, and it remained what it had been under the Old French Monarchy. The half-breed child took his mother’s, not his father’s rank and was therefore a slave or a servant if his mother had been such. As is apt to happen, tradition had rendered his position more severe, emphasising and aggravating it by extending to it the relations of White to Black.

Under the Old French Monarchy the mulattos or half-breeds were forbidden to eat with Whites, to wear the same materials as they, to occupy the same seats in conveyances or at entertainments and even to attend the same Church services: separate masses were held for those of mixed blood. In 1724 donations between Whites and half-breeds were forbidden; and marriage between them was belatedly prohibited by the famous ordinance of 1778. There was absolute prohibition of any union between Whites and persons of mixed blood.

At the beginning therefore, and up to 1789, the French preserved the old native tradition. They aggravated and emphasised the effects of this tradition, however, by extending it to the relations of these people with the Whites. It took the Revolution of 1789 and the illustrious defender of the rights of half-breeds and Negroes, Abbé Grégoire, to make people conceive the principle of equality of rights, not only as between Black and White, but particularly between Half-breed and White.

Last century saw in French territories the beginning of a movement, which acquired increasing momentum and which is to-day very strong and everywhere widespread, to give the half-breed the status of a French citizen, or at least the presumption that he is a citizen. First, permission was given, as it is in France, to search out the father. Then, what is more important,

in all the cases—and they are by far the most numerous—where the paternity is unknown, and where the half-breed is consequently debarred from claiming French citizenship, permission was given him to become naturalised and share the rights of every Frenchman in colonial territory. In all these cases the presumption is created that he is a French citizen, this presumption being founded on facts that can be proved, in particular on what is called the possession of civic status: the fact that he has been educated and taught in French schools in the French spirit and in the French manner; the fact that he has been reared and supported; and many other facts which constitute possession of civic status and which therefore raise in his favour the presumption that he is a French citizen.

In Indo-China and in Madagascar, in French West Africa and in Oceania also, it is at present, according to the most recent decrees, enough for the half-breed to be partly of European blood—not necessarily French—for this assumption to be made. So long as he is the offspring of Native and European he benefits by the presumption that he is a French citizen, and he is consequently acknowledged as such.

The half-breed's problem is thus solved at the moment throughout the French Colonial Empire; his traditional status is abolished; the fact that he is of mixed blood no longer makes him an outcast, so to speak. He is a French citizen, in enjoyment of all the rights pertaining to French citizens in the colonies. In these three cases, therefore, or with regard to these three social grades, the captive, the pariah and the half-breed, the French have been able to solve the problems of the first and the last, to abolish their previous status—at least in almost every place—and to offer them the liberty, dignity and security to which we still think they are entitled.

By a law of 1939, reversing the law of 1933, the Italian Empire takes a different course; the half-breed is a *Native*, not an Italian. Italy wishes him to be "reabsorbed" by the tribe; he is compelled to attend a native, not an Italian school. He is compulsorily *retribalised*. This is an experiment in the opposite direction which deserves to be attentively studied.

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## CHAPTER LVII

### STATE AND "CORPS"

Amongst the voluntary corps or associations, unconnected with kinship, based on friendship rather, which the French found already existing in their colonies, we must mention *craft guilds* (*corps de métiers*) and *brotherhoods* (*confréries*).

Flourishing or not, *craft guilds* were already in existence, not in the very backward countries in the bosom of the tribes which are not yet ripe for the "division of human labour", but in advanced countries which had already developed towns, and so knew something about "urban economy"; this was particularly the case in North Africa.

There was a whole system of corporations amongst artisans plying the same craft: vocational associations or trade unions, customary and traditional, such as existed in France until the Revolution. In Algiers itself, in the very year in which it was occupied by the French, the Pasha had had a document drawn up, the *tashrifat*, a list of the vocational corps with the name and description of each of their members. In the Dey's town there were at that date thirty-two such corps, each equipped with its own set of customary regulations.

There were similar craft guilds in Morocco and Tunisia, and they were also to be found, in scarcely developed and scarcely organised form, in the towns of Senegal and the Sudan. There were fishermen's guilds at Guet N'dar, near Saint-Louis, whose rites and practices have been explained in a recent book. There were huntsmen's guilds too with traditional rules and customs . . . Now what was the French attitude to these corps? What was the nature of the conflict which arose between the State and the craft guilds?

At the very beginning, certainly in Algeria, the French felt towards them just as they felt towards the tribes. They were in fact afraid; afraid that these groups might rise against them, and become rallying points for resistance to French authority. In Algeria, though happily not elsewhere, the first act of the French was to abolish such corporative societies. They were first limited, and their activities strictly controlled; then very soon a Governor's decree of 1868 abolished all guilds in the town



of Algiers. The lawgiver, fearful of sedition, thus destroyed the ancient native framework of urban order.

Elsewhere, in the Sudan, in Tunisia and in Morocco, where there was no *legal* abolition of the craft guild, it was often *in practice* abolished. These corps were in fact eliminated by the new state of affairs created by the French, particularly the opening of commercial relations between these countries and metropolitan France. The result of these relations was the direct and rapid penetration of French goods into house and market-place. These competed successfully with the time-honoured products of local craftsmen, whose methods of manufacture, governed by inveterate tradition, were "backward", behind the times. It thus happened, without any legal intervention, that certain local crafts disappeared, or were greatly diminished by the commercial contact between the colonies and the mother country. The colonial or local market, whether in town or village, was linked with the national and world market. These countries were brought into touch with the most distant markets, the German, the English, and later the Japanese. Some North African industries were threatened and would have disappeared, even without the arrival of the French, flooded out by Japanese goods. The Moroccan *babouche*, an article of superb artistic quality, was on the point of being replaced by the Japanese slipper whose soles are made of scraps of worn-out rubber. I saw the natives in Egypt too paying tribute to Japan by buying cheap articles of unusable, cast-off rubber. Without openly forbidding the import of such things, the French were obliged indirectly to prevent it, in order to enable the embroiderers of the Moroccan bazaars to survive.

It was the frequent fate of these craft guilds to be destroyed, in one place by legal enactment, in another simply by practical competition.

The French racked their brains to find a solution for this distressing state of affairs, and sought to preserve or restore the artisans' craft guilds. They followed the same line as with the tribes: having destroyed, they set about re-creating them. As early as 1888, almost at the beginning of the French Protectorate of Tunisia, a decree regulated the guild system with a view to preserving or restoring these ancient corps by protecting them in various ways against the victorious competition of the metropolitan or foreign industries. An order, at once legal and technical, was passed to guarantee—as in France in the days of

the Book of Crafts <sup>1</sup>—the honesty and bona fides of manufactured goods and the trade therein ; to supervise manufacture, as was being done in the West ; and on the other hand to establish craft schools and professional studios to introduce improved technical methods, and thus enable the native artisan successfully to hold his own against external competition. In Tunisia, Algeria and Morocco these workshops have been multiplied, not only for boys but recently for girls too, and some crafts have been preserved at least for a time. A whole system of protective supervision has been set up in Rabat and Fez, especially for carpets and for copper-ware, to promote export of these things abroad. This has proved successful, for these goods are now well known in France and they have there found, or re-captured, a whole large market.

Another fact helped the authorities to preserve and restore the craft guilds : the fact that crafts made their appearance in the colonies. New crafts arose to satisfy new needs, the natives began to look more and more to European products to increase their own comfort. It therefore became necessary to manufacture locally new goods which were in demand : thread and soap, fabrics, mirrors, knives and toys : all the things you can see in a market, each the same as the other, everywhere the same, far too much the same. They are often locally made by native artisans who could then be grouped together in a new corps or guild. So new craft guilds came into being, reinforcing the organisation of the existing ones. The old guilds were preserved ; new ones were formed ; the whole ancient system of artisan organisation into corps or corporations was saved from perishing.

We must speak at greater length of the brotherhoods if we are to grasp the more insistent, bitterer conflict which sometimes arose between the French State and these associations. The brotherhoods were groupings of a religious type, assemblies for worship or adoration, which have sprung up in the heart of African Islam, which always bear a special name and have flourished vigorously for centuries, and whose influence is not confined to any one country. The French found them in Algeria, in Tunisia, in Morocco, the Sudan and the Congo. In more than one sense they are international and universal societies, spread throughout the whole of Islam, having initiates from Dakar to Tokio in every country where Islam prevails. The Senussi Brotherhood, for instance, whose social headquarters—if I may

<sup>1</sup> *Libre des Métiers*. [See footnote below, p. 624. EOL]

so express myself—is in the Sahara, against which first the French and then the Italian State have been obliged to take up arms, has sent its offshoots into several continents : to Egypt and the Sudan, to the Balkans, Japan and China, to Indo-China and Indonesia. There is nothing regional or national about these brotherhoods ; they are international. They are powerful societies, sometimes very powerful, and always wealthy, enriched by the contributions which they skilfully extort from every country where they exist.

You can see at once that these great bodies of religious worship were already in many respects playing the rôle of the State. As regards their domain and their "jurisdiction" ("ressort"), they heralded and preceded the French, they prepared the ground for them, as it were, by bringing tribe into touch with tribe, and region with region. This was the reason why they and the French immediately and acutely conflicted ; they were already playing the very part which the French were about to play ! By the fact that they brought together circles that had previously been separate, and brought a conception of the universal to these countries, and by the mere fact that members of these brotherhoods whatever their country of origin shared the same worship and the same system and obeyed the same instructions, open or secret, they laid the foundations of a Common Law, before that other common law which the French brought with them to these lands. In the course of the conquest of Algeria there was at first very serious and marked conflict between these sacred brotherhoods and the French State. Abd ul Qadir<sup>1</sup> was in fact none other than the chief of a brotherhood who had mistakenly been made a king. He was in command of a confraternity whose power and riches were at his disposal, and for more than ten years he fought successfully against the battalions of France ! This page of history awakens another reflection : the brotherhoods were not always at one in their attitude to the French. Though their activity was more often directed against France, it was sometimes also used on her side and to her advantage. In Algeria, the brotherhood of Tijania took the French side almost from the first, and successfully supported it against the brotherhoods grouped round Abd ul Qadir. To the very end Tijania himself was a friend of the French and when he died, his daughter, who became chief of the brotherhood, gave them great and continuous support.

<sup>1</sup> [See footnote, p. 471 above. EOL]

At no time was there any thought of abolishing the brotherhoods in North Africa ; down to the present day they retain their wealth and power ; in politics, however, their rôle is at an end, for the French power enjoys almost complete control.

There are other very different associations in Central Africa, brotherhoods too, which however require separate treatment : the *secret societies* of Negro Africa. These are voluntary societies, founded by their initiates, which keep the method of that initiation secret, and do not reveal it to others, not even to their own kinsmen. They are hidden and veiled groups of men who play no small economic and political part in these countries. They are active not only in Senegal and the French Congo, but mainly in the Belgian Congo. There the Leopard Brotherhood has reigned and still reigns, nowadays under the watchful eye of the authorities. Its symbol is a leopard and at their meetings, which are always held at night, the members are clad in leopard skins. This society, like others of its kind in Central and West Africa, was playing an economic and political rôle long before the European occupation.

They played the *economic* rôle by exacting numerous contributions from the population just as the Islamic brotherhoods were doing in Algeria, Tunisia, Morocco and the Sudan. These societies lived at the expense of the Native, levying many forced taxes from him because their resentment was greatly feared. In vain the authorities in Algeria and in Morocco tried from time to time to forbid the public collections, organised by the envoys of these brotherhoods : these were a sort of Mendicant Order such as were familiar in olden days in France, or like the Buddhist *bonzes* of Cambodia who go about begging on bicycles or in traps. These begging missions or *ziarahs* have been forbidden by the French and English governments in their respective countries, but they have not yet been successfully stopped.

In more than one sense the Negro Secret Societies played a part in *politics* before the White Man's arrival. Whenever tribes were weakened by reason of the wars or vendettas which raged amongst them, when tribal authority had lost its influence, or when the elders or the chiefs were no longer effectively governing, then the secret societies seized control, and ruled by fear the populations who had lost their legitimate leaders.

Miss Kingsley has humorously described how these societies exploited their secret to play an active part in public life. Inasmuch as they all worshipped spirits, possessed spirits, governed

spirits, and could let them loose, they were greatly feared by the people, and they ruled the country by terror. The spirits, as it has been said, were a sort of *police force* and in more than one sense solved the question of security in Africa.

The work of these societies had therefore its good, as well as its evil side, and this embarrassed both the French and the English in their attitude towards them. The authorities hesitated and vacillated, though it was clear that something must be done, if not to abolish, at least to supervise, the secret societies. These very curious bodies were at cross purposes with the schemes of law and order which the French seek to work out in their colonies : their influence militates against liberty, security and prosperity, hampering or impairing all three.

Since people were often forced to become initiates, and consequently subscribers too, *liberty* was impaired. The natives, especially those who were better-off, were usually compelled to join the secret society, to let themselves be initiated and then to contribute ; it was in fact, surreptitiously, a kind of collective "capitalism", fed on fear, which impoverished the individual, whether member or not, for the sole benefit of the brotherhood whose chiefs used the general fund for their own ends.

These societies were guilty of cruel rites, especially at the time of initiation, and they thus impaired *security*. The privilege of being admitted and of becoming an initiate had to be paid for, not only by a contribution to the funds, but also by the endurance of cruelties inflicted : brutalities, humiliations, mutilations, tooth-drawings, wounds or burns, imprisonments and floggings . . . There was a "garden of torment" where gods and spirits revealed themselves only to those who stoically suffered torture. Security was also imperilled by frequent murders, either murder within the society itself, or the murder of non-initiates. These were carried out at night in the course of expeditions which have been frequently described by the English and the French in Nigeria and the Sudan, in Senegal and as far off as the Antilles, in the West Indies and in the Pacific. These societies avenged themselves by assassinations when people showed signs of wishing to resist their extortions. Within the society, certain of these groups practised systematic infanticide. The very famous secret society of the *Areoi* in Tahiti, which has disappeared under French influence, was a secret, ultra-secret community, an omnipotent aristocracy helplessly obeyed by ordinary men. The *Areoi* slew their children, *all* their children, to avoid here-

ditary rights arising within their community. All recruits had to be initiated or co-opted ; none might enter the secret circle except the chosen, and the elect. New entrants were subjected to severe scrutiny from which heredity offered no exemption. This was the method they thought they had discovered for maintaining and perpetuating the reign of the most select. It was one cause, amongst others, of the depopulation of the Pacific archipelago. There were murders and assassinations too—let us not shrink from the words—of victims outside these societies : the murder of adults who resisted the exactions of the conspirators ; murders too of Frenchmen : these have not been forgotten.

The other benefit the French aim at bringing to their colonial subjects, *prosperity*, is hampered also by these conditions. The natives, too often discouraged by the plundering to which they had been subjected, lost courage . . . a courage already shaky enough, owing to the climate. Begging was better than work ; hope, the mainspring of enterprise, was killed by forced taxes.

These are the reasons why both English and French have for a long time combated these secret organisations. They first tried direct action. An order of 1840 in Senegal empowered the French Governor to proclaim the dissolution of these secret brotherhoods. It was left to him, and still is to-day, to judge the opportune moment for so doing. The mere fact that a secret society has been formed without the knowledge of the French authorities, even if it has committed no offence, is sufficient reason for the Governor's dissolving it if he so decides. The French went even further. A decree of the Republic in 1848 banned in France itself all secret societies—political sects or parties secretly organised. This decree was extended in the very same year to Senegal to be applied to those societies, mystical rather than political, which preyed financially on the Negro inhabitants. The ban—let us face the fact—has not enjoyed complete success !

In Algeria the French tried whether the education of the natives might not be more effective by showing them the folly of joining these societies to worship gods, spirits and jinns in whose power they believed. Under the Second Empire France sent out . . . a conjuror, the famous Robert Houdin, to demonstrate that the "juggleries" as they were called, of their *marabouts* could be matched by a European, an impure Unbeliever, and that the secret was pure humbug ! This unusual missionary

reported the complete failure of his preaching or more accurately of his demonstration.

As for the Central African secret societies, robbers and murderers after the fashion of the Leopard brotherhoods, other powers were given to the French legislators since these bodies were the secret agents of murder and crime, sometimes amongst each other, more often amongst the non-initiates whom they despoiled. From the moment that they have committed a crime or an offence by their assembly or by their action, they become liable under French penal law which upholds public order, and the new Penal Code of French West Africa may be applied against them, more especially if the offence is the result of *magic*.

These secret societies are always riddled with magic. They claim to be able—and it is impossible to debunk them—to evoke spirits to serve their avenging purposes and to injure people by magic. They achieve their ends by speech, by writing, by gesture, or by action. Thus by making a wax figure and piercing its heart with a dagger they believe that they can distress, ruin, wound or slay another person. These are enterprises of intention only, but nevertheless they are “attempts” at crime or offence, and as such are punishable by French law. The effects of a belief in magic—which is cultivated and maintained by all these secret societies—are extremely damaging to French purposes in the colonies: this belief encourages fighting, murder and robbery.

It encourages *fighting* between tribe and tribe, between household and household; for the aim of magic is to cause injury in the first place to strangers, to non-kinsmen, to other households and to other tribes: hence spring deeds of vengeance, and fighting, sometimes collective, sometimes individual. Such and such a tribe in Australia gets the idea that such and such another tribe has wrought evil magic on one of its members; it flings down the gauntlet which is almost immediately followed by a duel between two chosen champions of the two tribes. More often each tribe in its entirety attacks the other and the result is often the extermination of both. This is yet another cause of depopulation.

Individual *murder* is another result of these magical practices. Chiefs and sorcerers practising magic against their enemies arouse resentment. When one group believes that one of its members has been slain by the magic of some particular sorcerer, they start a blood-feud in which the sorcerer or one of his kinsmen is killed. Real or imaginary murder by magic is still, down to our

own day, the result of the harmful and murderous belief in magic, and this belief is fostered and preserved by the secret societies.

Lastly, *robbery* is another offspring of magic. Since people in these countries believe that injury can be caused by magic, a robber can work on his victim by provoking his fear, his dread of becoming the target of magic action, and the robber then thinks he has the right to steal the victim's goods. Thieves and plunderers are initiates; that is one of the advantages of initiation!

That is why the French authorities have long—I might say all along—been compelled to take measures against magic as a distinct and separate evil, though in general it remains the work of these societies, and in practice, if magic is to take full effect and cause the maximum injury, it must be the work of a society.

There is of course personal magic too, the work of one individual; private magic, exercised by one individual against another, a thing which as we know still occurs even to-day in France. In France such magic is repressed inasmuch as its purpose is to commit a crime or an offence: a murder or a robbery. Even before the arrival in Annam of the French, the Code of Gia-long, drawn up by that Emperor himself, penalised magic and condemned sorcerers, severely attacking all the cruelties associated with initiation ceremonies.

The French Penal Code, which has been "extended" to the French colonies, and which now reigns throughout almost the whole French Empire, formally punishes the infliction of injury by means of magic. The mere act of torturing or even flogging a new initiate constitutes an infraction of French law. By a decree of 1935 relating to Libya—it is worth noting that this decree was issued after consultation with the *ulama*, these holy personages who are guarantors of Islam, and that they accepted it—the Italians banned what the decree called *faqirism* throughout the whole country. The term *faqirism* covered all the procedures which were practised—as they still are in Algeria and Morocco—in these secret assemblies or these brotherhoods known as *zawiyas*: self-wounding, often serious; walking on fire; swallowing glass or venomous animals such as vipers or scorpions . . . all which things may be witnessed in the Moroccan *sudd*, for the brotherhood of the Aïssawas which keeps up all these practices has by no means disappeared, and continues to indulge more secretly in what to us and to our common sense seem these aberrations.



There are however other associations that are more advanced. These are the active groups based on function or occupation: the *occupational societies*, as we might call them, all of whose members pursue the same vocation.

These are social groups based not on descent or kinship, nor yet on contiguity of domicile, but on a common trade or craft. They are to be found particularly in the towns, where a certain number of citizens follow the same calling or pursuit and so in time come to form a particular society in virtue of their common activity.

The corporations or craft guilds are throughout Islam active associations of this type. There are, however, others also, and it is advisable to distinguish occupations of a practical from those of a spiritual type.

Throughout Islam there are groups whose members perform the same economic function.

But there are also groups of a spiritual nature, what we might perhaps call preoccupational rather than occupational societies. We shall therefore speak of *preoccupational groups*, those based not on a trade or craft but on an ideal; not on any form of practical work but on a form of worship. Such are the religious brotherhoods, the *tarîqa* as they are called in Arabic, whose curious rôle and influence I have already pointed out in helping to evolve the conception of the State. These brotherhoods are composed of men having the same ideal, the same ritual and the same worship. They are therefore also always active societies, but their activity runs on spiritual lines based on a common preoccupation rather than on a common occupation.

The craft guilds (*corps de métier*) have survived and were particularly vigorous throughout the Maghrib in the old days before the coming of the French. If in consequence of the French occupation they have disappeared in Algeria, if the French, mistakenly perhaps, were tempted to abolish them, this applied to Algeria only; in Tunisia and Morocco they preserved them, and in our day they have given them a new lease of life. In many places they are decadent, for they have been hard hit by the progress of French industry, in places they have even vanished, but in general as I have just said every effort is being made to save them.

Just as in France, the craft guild is always a product of urban life; it is an offspring of the town, and it is in the towns that it

has flourished. Craft guilds were to be found in the Middle Ages in Algeria, Tunisia and Morocco, in Egypt and in other places. In these countries, as in France, they were able to play a part in public life. They frequently wielded political influence; according to circumstance, they supported or opposed the beys, the deys and the sultans. Thus, in the Maghrib, just as in the West, these bodies were institutions of a public character; it is therefore fitting to formulate a definition of them and then on broad lines to analyse their composition and constitution.

In general terms our *definition* is valid for all the professional bodies, for all the craft guilds, and would apply as well to the European guilds of the Middle Ages as nowadays to the corporations of the Maghrib towns. The professional group in the old sense has three characteristics: it is specialised, it is hierarchic, it is localised. In all these points it differs, as I shall show, from the kinship groups.

It is *specialised*, in that it represents a trade or craft, and is formed of persons engaged in the same kind of work. It is organised round a practical industry, usually urban and practised by artisans. We need feel no surprise that the guilds which remain the most thriving and prosperous are those of the great town crafts such as tailors, outfitters, slipper- and sandal-makers and above all, saddlers, all those who used to make saddles and harness such as are dear to the heart of the aristocratic horseman, those in fact who catered for warriors, nobles and people of the court. Thus in Tunis these guilds remained powerful as artisans serving the courtiers. But *rural* guilds also appeared. Certain guilds in particular arose, and have survived down to our day, which were formed of itinerant artisans travelling from town to town or from tribe to tribe: such were the falconers and the bards and the story-tellers, who still attend markets and fairs to keep national traditions alive by recalling to their hearers all the old national tales in which heroes display their virtues. These guilds of itinerants have their chiefs, their status, their tradition and their own laws, and they work in groups which have their unity.

The chief innovation which these active guilds have brought to the Maghrib territories is the *hierarchic* organisation. For there are defined ranks within them, the one superimposed on the other. As in France, so amongst them, we must distinguish the apprentice, the journeyman or mere workman—and then the master, above them the chiefs, the guild authorities, who are

known as *shaikhs*, to imply that they too, like the chiefs of the brotherhood, have, in a certain sense, a religious character.

In the tribe, in the family, there was full equality. Though there were chiefs and heads of families, these were bound always to follow the counsel and take the advice of the principal personages of the family or tribe. Amongst the tribes Islam was profoundly equalitarian and democratic.

This is not so in the craft guild. Like the towns, Guild and Brotherhood brought inequality and hierarchy, for in these bodies there is always rank above rank and a man is promoted upwards through successive grades of superiority. In the brotherhood you become an initiate, you become incorporated, you become adopted, but not all at once. You climb upwards by "stages"; in the guild you become an apprentice, you become a journeyman, you become a master; from among the masters, one may eventually become *shaikh*.

The guild is also usually *localised*. From Cairo to Fez, from Damascus to Tripoli, certain guilds belong to certain quarters or certain streets, each having its separate place and position. The artisans of a guild, just as in mediæval Europe, are assembled and united by the ties of neighbourhood or even co-habitation. In the bazaars, whether roofed as nowadays in Damascus with corrugated iron, or covered as in Tunis and Tripoli by airy vaulting masked in virginia creeper, the people dedicated to the same trade squat together side by side. All the saddlers or all the slipper-makers, all the embroiderers in gold and silver thread, have their open-sided booths or shops—the French word *magasin* (a shop) and the English word *magazine* are both borrowings from the Arabic *maghzan*, a storehouse—side by side. Being thus closely, intimately, housed together, the members of a guild morally form one society. It was sometimes a legal obligation that all men exercising the same craft should set up and live in the same street, just as it used to be in France, and as we can read in Étienne Boileau's *Book of Crafts* about guilds in Paris.<sup>1</sup> It may sometimes have been an obligation, but in any case it was a tradition which has always been followed in these countries right down to our own day. It is therefore easy to understand that these guilds from their close and intimate proximity should long have had the same habits and the same laws. In the course of time this proximity resulted in each craft

<sup>1</sup> [Étienne Boileau, author of the *Livre des Métiers*, was Provost of Paris under Saint Louis. He died about 1269. EOL]

developing its own system of customary practice, different from that of the neighbouring crafts. As in the tribes, this body of customs and regulations was usually transmitted orally by the elder men, and conveyed by word of mouth from master to journeyman, and from journeyman to apprentice.

It has sometimes happened, notably in Morocco, that the rules and regulations of these guilds have been edited; thus for the Fez guilds we have the written rules, for at least certain of the crafts, which we can examine, and from them we can see how the traditions of these vocational bodies have in Morocco preserved their identity and continuity despite the passing of time.

This gives us the means of accurately defining the *composition* and the *constitution* of these craft guilds, and of pointing out how they have in fact given a new law to the town and played a part in public law, how they have formed bodies of public law in relation to the authority of beys, deys and sultans.

The composition and constitution of the craft guilds display two main characteristics: they have grades and they have a certain power. Their grades make them a *hierarchy*; their power we might call *autarky*; for they have striven to make themselves as far as possible autonomous—without succeeding, or only ultimately succeeding—and to emancipate themselves from the power of the sultan. Hierarchy and autarky, these are the two characteristics by which all these guilds asserted themselves, and brought a whole new system of law right into the heart of the towns.

They possess grades of two distinct types: grades *within the guild itself* and *grades between the various guilds*. To give a guild its proper definition, we must always consider it both from within and from without.

Within the guild itself there were, and there are—as in Mediæval Europe—three principal grades: the apprentice, the journeyman and the master artisan.

The apprentices were, and are, youngsters of seven or eight years of age learning the trade. The hours of work, like the age of the worker, was usually not laid down for the apprentice; at most there was an accepted custom, according to which men, and even the children, worked from sunrise to sunset; short hours in winter but long in summer.

The wages of the apprentices were little regulated. Here and there, however, especially in the written rules, we find regulations on the subject. Thus we learn that in Tangiers the

wage of an apprentice was from fifty centimes to two francs a day, according to the trade ; this was at least a wage, whereas often—as in old-time Europe—the apprentice got no wage at all.

In all the guilds there are two recognised grades of journeymen : there are the manual workers, the unskilled workers as we should call them, those who perform the ordinary everyday jobs of current work, and then the specialised or skilled workers, assistants as it were of the masters, who are known as *mugaddims*. We should note that this is a term also used in the religious brotherhoods. In both cases the *mugaddims* are the supervisors or overseers, the master's representatives, whose business it is to govern the mass of the ordinary workers or brethren in the name of the master or chief.

The masters, or independent artisans, are the men who have been able to purchase a shop or a workshop and who sell their wares to the public. These are the folk you see squatting on their heels, their yellow slippers by their side, lurking in their dark little booths waiting for the possible customer to come and buy. These men are the chief personages of the guild, and they, or at least the bulk of them, are usually recruited—as they were in olden days in France too—from men who have inherited the position : the craft handed on from father to son. Inheritance is sometimes a matter of simple actual heredity, either accepted or merely tolerated by the custom of the guild, sometimes, as in the more advanced and prosperous guild of Tunis it is sometimes legally proscribed, where the guild regulations expressly lay down that the mastership of the craft must be passed on from father to son like an entailed estate. In this sense there is a link between a new group and the older groups in the guild which in this respect are still societies in whose working the bond of kinship plays an essential part. Sometimes by right, sometimes just in practice, the craft is transmitted by filiation, and the accession to the rank of master artisan follows the same lines as the inheritance of the family patrimony amongst kinsmen.

Guilds are further distinguished amongst themselves by various grades or degrees in their *external* relations to each other. So, in these countries—as in mediæval Europe—we find some guilds ranking higher and some lower in public estimation : there are major arts and minor arts, as the Florentines would have phrased it. This is so in the town of Tunis, where there were, and at the present day still are, four major arts practised by the pre-eminent guilds, just as there were in Paris until the

end of the Old French Monarchy the six principal guilds headed by the Mercers' Guild.<sup>1</sup> The French Mercers are makers of *chechias*,<sup>2</sup> weavers of silk, perfume-merchants, and saddlers.

Within the guilds the marked powers exercised, are in general much more clearly defined and recognised than those of the family or the tribe. This is the second characteristic of the corps of guilds. They possess not only hierarchy but *autarky*. For centuries past these corporations have striven obstinately and bitterly, but always without success, to shake themselves free of the beys, and even of the sultans, and to acquire the same wide degree of legal autonomy as the family or tribal group.

In these guilds we therefore find the two aspects of power which characterise all authority in the Maghrib: the Council and the Chief, the *jama'a* and the *amin*. In the matter of power the traditions of the guild have been modelled on the traditions of family and tribe.

In the foreground there is first the Council: the assembly of the master craftsmen of the guild who traditionally wield the effective power of the guild. This council bears the same name as the tribal assembly because it is generally—or before the French occupation it was—as democratic and equalitarian as the tribal assembly. All the master artisans have the right to a seat, if not necessarily to a voice, in the assembly. Here we must call attention to the same distinction as we found prevailing in the tribal council. In most cases the master craftsmen have without exception the right to be present, but not the right to speak. As in the tribe they must be old men before anyone will listen to them. Even in the midst of the town it is the same as in the bosom of the tribe; there is gerontocracy, the rule of the old; and the voice of the old men prevails.

The Guild Council has—or had—double power: the power of legislation and of intervention. It was they who announced and altered the regulations of the guild and laid down the law. It was they who intervened in what we should call "labour disputes" (*conflicts de travail*) which were at the same time—just as they were in old monarchical France—political quarrels too. The Council used to intervene as arbitrator to resolve these

<sup>1</sup> [It may interest the English reader to recall that there are seventy-nine City Guilds still extant in London, the largest with four hundred and twenty-one members, the smallest with twenty-eight. From their adoption in the 14th Century of a distinctive dress they are often known as Livery Companies. They have a strict order of Civic Precedence and the twelve "great" companies are headed by the Mercers' Company. EOL]

<sup>2</sup> [The military caps worn by French troops in Africa. EOL]

conflicts, which arose between the craft groups and the local urban authorities, or even between the craft groups and the bey or the sultan. Even in those days there were workers' strikes and also boycotts: internal and external conflicts.

There are, however, cases, and there are places where the Council of master craftsmen is aristocratic and not, as in the normal way, democratic. Particularly in Tunisia, a country richer and more civilised than its neighbours and where we always meet a more advanced state of evolution, an aristocracy had arisen in the heart of the guild and in the Council of master craftsmen. In this Council there was an inner, secret Privy Council which had in the last resort the final power. This was known in Tunisia as "The Big Ten" (*les dix plus grands*) and this was a closed cabinet whose business it was to deal with all conflicts, internal or external, and which had further the duty of preserving the guild's whole body of customs, what in one word is known as *urf* Law, a word which is used in many various meanings in the Maghrib. The *urf* tribunal was composed of the Big Ten master craftsmen, and this Inner Council had contrived to secure and to retain in its own hands the sole legislative power: the preservation and the alteration of the customary law.

Whether the Council of master craftsmen is aristocratic or democratic, there is also and always the Chief or *amin*: the permanent head, and the executive power in the guild, as the chief is the executive power in the tribe. It is his business to carry out the Council's decisions. The Chief is sometimes—for here we always find infinite variations—an elected chief, sometimes a nominated chief. Amongst the guilds of Fez or of Algiers he is usually an elected chief; normally the Chief holds office for life. Occasionally the office has become hereditary, as in Tunis, where inequality has become pronounced.

The Chief had, and has, two chief functions: executive and conciliatory. Like the Council and even more than the Council, he is first and foremost charged with applying the regulations, with maintaining and guaranteeing the customary traditions which have been elaborated and laid down by the Council of master craftsmen. Secondly he is the conciliator; for in the petty conflicts, the everyday frictions between neighbours, which are punctuated with liberal vociferation, it is always the Chief whom people go off to fetch and who comes along to compose—usually successfully—these trifling quarrels. He also acts as

arbitrator between the master craftsmen themselves, and for this kind office he is given a very small gift in money or in kind.

To our eyes, the rules and regulations of the craft guilds seem at once to resemble and to differ from the old system of tribal law.

They *differ* in that they are a new law that has been introduced, an urban and progressive law, a commercial and business law, a law which gives greater recognition to inequality and liberty, which permits the daring and enterprising to grow rich and to distinguish themselves, and ultimately to become, as in Tunis, one of the Big Ten.

They *resemble* the old system of tribal law in that they conspicuously and strongly retain the memory of tribal traditions ; in a certain sense there remains the patriarchal rule, firmly based on the father-to-son relationship, handed down by heredity and descent.

These guild organisations, composed of individuals all exercising the same function in the practical world, must be observed from the point of view of their *activity*. We must ask ourselves particularly what position they can claim in the urban economy of the Muslim world.

The Muslim economy, as always in Islamic countries, has two sides to it, two aspects : a spiritual and a material rôle. The guilds, while they are a corps of craftsmen playing an economic part in the life of the town, are at the same time brotherhoods of a religious nature.

They are *spiritually* a kind of religious brotherhood inasmuch as they have preserved a religious character even down to the present day ; inasmuch as they have—just as we formerly had in the West—a patron saint, like a "founding father", a hero, famous by his exploits, a hero of whom all members of the corporative body are the living issue. Thus the parallel between the vocational group and the kinship group is never lost sight of. Social groupings in North Africa always cling to the idea of a mystic filiation which is their distinguishing characteristic.

The worship of their patron saint fills a considerable part of their active life ; they have frequent banquets and celebrations to honour the saint and to re-establish in the banquet the communion of the corps. There is not the same marked contrast as there is in Europe between the craft guild and the religious brotherhood. The guild never ceases to be a brotherhood.



On the *material* side, the guild's productive activity is exercised in two ways : internally it *legislates*, externally it *intervenes*.

In North African towns the craft guild possesses a very generous measure of autonomy : it *legislates* for its members, and in this it still in certain respects resembles both the family and the tribe. Just as there was legislative autonomy in the bosom of the tribe and of the family, just as the tribe and the family tended to give themselves their own laws, so in the towns the corporate group of the craft guild freely gives itself its own laws. It is through the Council of the master craftsmen that the regulations, often oral, only sometimes written, are announced and guaranteed.

Regimentation was carried very far, as it used to be in the West ; there were regulations governing manufacture and sale, the aim of which both in Orient and Occident was to preserve the guild's monopoly. Thus in Algeria, Tunisia and Morocco we find that the *ingredients* are regulated, the materials from which the craftsmen are allowed to produce the articles offered for sale in the *souqs* ; similarly the *processes* of manufacture are controlled, the techniques by which the materials are converted into goods.

The observation of these regulations is guaranteed by many penalties—as of old in the West. There are professional penalties to check any violation of the guild's regulations : the Council may decide to close the shop or the workshop. Sometimes the trade-marks are destroyed, these religious symbols which are designed to distinguish the products of the guild. Sometimes, and more often, the penalty is the disapproval and mockery of fellow-craftsmen, the word or gesture which publicly rebukes the violator of the regulations.

Secondly, the guild may intervene *externally* : sometimes to support outside authority, for the benefit of that authority, sometimes in opposition to outside authority, the corporate power of the guild opposing the power of the sultan.

The guilds may *support* authority, for they are subject to taxes and *corvées* ; they are consequently servants of the State and the authorities have long since contrived to lay their hands, in some degree at least, on the activity of these vocational bodies ; the guilds are therefore in no sense fully independent ; they have legal ties with the sultans or beys involving duties ; they are bound—and were in earlier days even more bound—by taxes and *corvées* which were the symbol of their subjection to the authority of the State.

The guilds may *oppose* authority, inasmuch as they have been, and still are (except in Algeria where they no longer exist), both in Morocco and in Tunisia, hotbeds of agitation, and inasmuch as they lend partial support and encouragement to the movement of protest and demand which in Tunisia is known as the *dastur*. This movement is also supported by the brotherhoods and most of all by the universities. There exist texts which prove that ever since the Middle Ages the vocational corporations, the craft guilds, have been involved in agitation and protest against the beys or the sultans.

We have proof that for the last two or three centuries the guilds have known all about strikes, which were at the same time economic and political. In the towns of Algeria and Morocco the butchers and the saddlers have on occasion closed down, not in order to claim enhanced prices for their goods—for these were always fixed by guild regulations—but to protest against some action of the sultan and thus to challenge the power of the sultans. Even in Egypt and in Syria the boycott was employed by the considered and deliberate decision of the guild Council.

Let us now turn to the consideration of the *evolution* or transformation of the craft guilds, especially since the French came to rule in Algeria, a hundred years ago; in Tunisia or Morocco very much more recently. Here we find the diversity in their constitution and in their activities which I have already dwelt on. Their history has taken different courses from country to country, both before the French coming and after it.

There was first a whole evolution of these corporative bodies *before* the French occupation, similar to or parallel to the evolution of the craft guilds in mediæval Europe. Having been from a legal standpoint very largely independent and autonomous, they became more and more the victims of the authority of outside power. The external relations of the guilds, of which we have spoken, ended by the beys and sultans asserting authority over these corporations particularly in Tunisia, but also, though less firmly, in Algeria and Morocco too. Even before the arrival of the French, the State had asserted itself; the beys and sultans had succeeded in imposing their legislative and executive control on the activities of the guilds. Two characteristic and original institutions which we meet everywhere throughout Islam marked this assertion of royal power: the *mukhtasib* and the *hisbah*.

The *muhtasib*, or as the French would say, the *provost* of the traders was an official whose mission was sternly to control the life of the vocational groups. He was an agent of the Sultan's and was appointed by the Sultan, in contrast to the *amin*, or Guild Chief, who was nominated by the Council of master craftsmen. This official's business was to intervene from outside in the activity of the guilds, directing and controlling them, and limiting more and more the autonomy which these bodies had earlier enjoyed.

The *hisbah* was the moral tradition which had just been established amongst the sultans of Andalusia in the days when the Arabs ruled in Spain, and which later spread to the sultans and beys of Algeria and Morocco. According to this tradition it was the duty of the local powers to make sure that a certain standard of morality was preserved by the guilds in their dealings, especially in dealings with their customers. The Sultan's agents, and in the towns all the pashas appointed by him to regulate urban life, were entrusted with the duty of controlling the price, the quantity and the quality of manufactured articles. These professional groups bore a close resemblance to the modern Law Society (*ordre des avocats*) of the West<sup>1</sup> or such a society as some people would like to see established for physicians.<sup>2</sup> Once again, these brotherhoods were bodies having moral standards and being bound to observe a moral code and a standard of duty higher than that expected of the ordinary person.

This evolution of the craft guilds developed, as we have said, on different lines according to whether it took place in Tunisia, Algeria or Morocco. It varied in pace and in degree, being more or less swift, more or less absolute. It was less radical in Algeria, where the French from the moment of their occupation felt bound to impose their legislation on the guilds.

It is in Tunisia that the evolution is most clearly evident: it is the same evolution as took place in our European world: from democracy towards aristocracy. At the start all these craft guilds which very closely resembled the family or the tribe—a point we must not lose sight of—were democratic groups. There prevailed a very large measure of equality between the master craftsmen, both in regard to authority and duty, since all decisions, whether legislative or executive, were always taken by the Council of masters.

<sup>1</sup> [I.e. presumably of France, for it is unlikely that all western countries have precisely similar organisations for the legal profession. EOL]

<sup>2</sup> [The British Medical Association, for instance? EOL]

In Tunisia, long before the arrival of the French, the aristocratic principle had entrenched itself. Two new principles, those of heredity and authority, had become established in the guilds, both in Susa and in Tunis. As we have said, the position of master craftsman was, according to guild law, sometimes a written law, was a matter of direct *inheritance* passing always from father to son, the sole restriction being the right of the Council (or *jama'a*) of masters to make enquiry, in the name of the *hisbah*, into the new candidate's morality. It might occur, but only in very exceptional cases, that the mastership was denied to the son of a practising master or of one already in possession. The rule remained, however, that accession to the position could be only by way of heredity. At most it was necessary for the *nomination* to be made by the bey; the *presentation* was the work of the masters' council, but the nomination was the bey's. In actual practice the bey took good care not to nominate anyone save a master craftsman's son. The principle of heredity was consequently much more firmly established in Tunisia than in Algeria or Morocco, but the principle of *authority* was also more firmly established there, in virtue of the Bey or the Sultan's having power to intervene in this craft activity. The royal grip on the life of the guilds had long been very strong in Tunisia. It was there that the guild chief, the *amin*, was never elected as representative of the master craftsmen but appointed in the bey's name by the *muhtasib*, the provost of the merchants. He was thus the incarnation of the bey's authority, even though he was in fact chosen for the post only on the suggestion of or on the presentation of the master craftsmen.

In Algeria things worked out differently. There always was intervention by the deys in the life of the guild: an attempt to acquire the power to regulate the activity of vocational societies. This intervention, however, had by no means the effect or the value that it had in Tunisia. The deys' intervention into the life of the guilds was mainly signalled by the imposition on them of tribute and of services. The tributes or taxes imposed indicated the guilds' subjection to the deys' authority; the forced services or *corvées* were imposed in the interest of the rulers of Algeria. In particular, the guilds were compelled to feed and clothe the garrison which the Dey of Algiers maintained in the *qasbah*, or citadel.

The authority of the Algerian deys never—certainly not usually—went so far as to be able, as was the case in Tunisia,

to impose on the guilds regulations drawn up and promulgated by an external power to govern the internal affairs of the corporation. More than that, travelling southward towards the desert you could find at Ghardaya, one of the seven towns of the Mزاب which by their remoteness were beyond the control of the beys, craft guilds that were entirely independent and which had preserved almost wholly intact the old guild autonomy. These guilds moreover still survive.

The evolution of the craft guilds in Morocco was again different, often strangely different, before the French occupation. There even to-day you can find still alive, still surviving, the ancient character of the old guild. There, the legal autonomy of the vocational groups of early times has really contrived to persist.

In Fez or Rabat, or better still in Marrakesh, even the casual passer-by is struck by the archaism of the craft guilds, which are very largely composed not of Arabs but of Berbers. They are not confined only to towns, there are rural guilds too of itinerant artisans who travel like the nomad artisans of France from town to town, from tribe to tribe, plying their trade. There are the groups of hunters of whom I have spoken; though they have now disappeared, there used to be groups of falconers, breeders of falcons and hunters who formed semi-secret guilds; these were religious folk having a tradition that they were descended from a patron saint, and practising a peculiar ritual. They used to sacrifice a cock or a he-goat before they went a-hawking. In Moroccan territories urban law is closely allied to rural or even tribal law. But it is none the less true that in Morocco the authorities had endeavoured, less successfully and less effectively, to dominate the craft guilds, and these had been obliged to indulge in asseverations of loyalty or even of submission to the authority of the Makhzen.<sup>1</sup> Certainly in Fez, and even in Marrakesh, the authorities had succeeded, before the French came, in levying various taxes from the guilds. The purpose of a tax, certainly in olden times in the Maghrib country, was not to provide financial resources for the reigning Sultan. It was primarily intended publicly to demonstrate the submission of the tax-paying community to the Sultan's authority. The payment of tribute was in fact a symbolic recognition of the sultan's power.

In conclusion, let me say a word about the *dissolution* of the

<sup>1</sup> [The Sultan's central government. EOL]

ancient craft guilds which was sometimes, especially in Algeria, a consequence of the French occupation. Just as the French felt it necessary to interfere with the power of the family and of the tribe, they also laid a hand on corporative power. The French occupation dealt a death-blow to the Algerian craft guilds; it brought decadence to those of Tunisia and Morocco also, even where it did not abolish and destroy them. We have documentary evidence that when the French arrived there were thirty-two craft guilds alive and flourishing in the town of Algiers alone. The newcomers, ill-informed as they were, confused the issues, and imagined the the guilds, being also brotherhoods, were always hotbeds of agitation and protest, and would therefore be an obstacle to the establishment of French law and order.

The dissolution of the vocational corporations came about in two ways. Sometimes it was spontaneous, resulting of itself from mere contact and the fact of the French having come into the country. For French goods came in too, increasingly flooding the local markets and thus fatally competing with the native industries which faded away and disappeared, often beyond recall. In Algeria, however, it was the French administration which deliberately abolished the guilds. In 1868 all the craft guilds without exception were suppressed in the town of Algiers, the very institutions which the French are nowadays striving to support in Tunisia and Morocco, and for the benefit of which they have founded heavily-endowed services in order to protect the native industries.

In Tunisia and Morocco they regimented the craft guilds too, sometimes with happy, sometimes with unfortunate results, but in either case encroaching on the guild autonomy of "the good old days."

## CHAPTER LVIII

### NEW GROUPINGS

Simultaneously with the conflict between the French authorities and the old native groupings, another phenomenon was seen in the colonies: the rise of new groupings, whose inspiration came to the natives as a revelation from the French. They were ignorant of the type of association familiar to the West: the interest group, whose primary concern is to make a profit: *secular* not religious groups, modelled on the "societies" or "companies" of western civil and commercial law. This was *innovation*, inventing something, bringing something new, no longer abrogating or modifying something already existing.

Chief among these new creations were the *trade unions* (*syndicats professionnels*). In North Africa and in the towns, at least of the French Sudan, the natives began to organise themselves into trade unions in accordance with the French laws of 1884 and 1920 more or less adapted to the colonial "climate". The negroes were able to pass directly, without either preparation or introduction, *from the tribe to the trade union*. Having come into the towns to work as artisans, they were transmogrified into "workers", employees, wage-earners, often proletarians; they formed a trade union or, to be more accurate, they were formed into a trade union. They thus passed without transition from a patriarchal to a trade-union group.

The mental upheaval was terrific. These trade unions—fairly numerous now in Algeria and in Indo-China, less numerous elsewhere—are from every point of view very different from the natural groups sharing kindred interests, in particular from the craft guilds that had existed in these countries before the colonisation by the French.

They are novel by reason of the object aimed at and by their spirit, inasmuch as their aim is to achieve *profit* through *power*.

*Profit* takes first place: their overriding aim is to obtain material gains for masters and workers; but they aim at *power* too. Their ultimate aim, their long-term objective, is to rule, to impose their will on producers and purchasers alike. By their very definition they are class societies and fighting machines who dream of dictating workers' law to the natives of to-morrow.

Profit and power are to be attained by battle. These trade-union groups will work a profound change in the traditional colonial world which was held together by patriarchal and religious ties. Two *mystiques* are about to come into collision.

The trade unions are novel too in the way they set to work. In their purpose they are industrial groups, in their methods they are *contractual* groups. One of their methods is to come to an agreement with their adversary on new rules and new tariffs. Another of their characteristics is that they are societies which a member is as free to walk out of as he is to enter. They are voluntary associations, institutions of liberty—such at least is the initial theory. Profit, Agreements, Liberty: these unheard-of catch-words stress the contrast between them and the traditional groups based on community and authority.

Lastly, they are novel in their breadth and scope, for they are national and international, not local, not urban as were the craft guilds. By definition and by their activity they embrace a whole nation, or even several nations. "National syndicate" is a common term; even, sometimes, "international syndicate". Thus links are forged in the colonies between the workers of the country and the workers of other countries, and in particular between them and the workers of the mother-country. The colonial trade unionists, whether Yellow or Black, are "federated" with other trade unionists elsewhere. They are affiliated—whether *de jure* or *de facto* matters little—to the General Confederation of Labour.<sup>1</sup> It is this national or international relationship which was invented or rather revealed to the native by the French occupation. This was an immense novelty, the growth and results of which are there for all to see, and one mark of which is relationship with the outside world. The driving spirit, as he is called, the inspirer of the trade union and often its dictator, is far more often a Frenchman or a European than a Negro. The colonial trade union of "coloured labour" is almost invariably founded and led by a foreigner from outside.

For the last ten years we have seen Algerian Workers' Congresses, attended by French and Arabs, by Algerian and Moroccan Berbers, and by Negroes from Senegal and the Sudan. This represents the transplanting to the colonies of French institutions: the "Workers' Congress" is always the herald of trade unionism, it is begotten in the colonies only by imitation and contagion.

<sup>1</sup> *Confédération Général du Travail.*



We must not quote this origin without remembering another factor which probably contributed not a little to the appearance in the colonies of the trade unions : the fact that trades and crafts have sprung up which, as I have pointed out, did not exist before the coming of the French. New trades have arisen, not merely small ones, but great factories and mills. Dockers are required in far-off ports, labour and technicians are needed in the spinning mills, miners are needed, both above ground and below, to extract metals and coal. It is in these new trades particularly that the unions have made headway. The stevedores of Oran already have four thousand trade unionists among their number, fighting subscribers or subscribing fighters we might call them. In French India, but especially in English India, many large and powerful trade unions have been formed of recent years amongst the workers in the textile industries : in Madras, Bombay and Calcutta their membership runs into hundreds of thousands.

These novel vocational groups, created for profit and for fighting, first appeared, as in France, among those connected with the printing trade : it was the intellectually-employed worker who everywhere, even in the colonies, founded the earliest trade unions. It is a law, to which I do not think any country can furnish an exception, that the first trade unions are always formed by workers connected with typography. Their union in Algeria was founded in 1880 and has therefore already a history of over sixty years.

Such is the appearance, and such are the motives of the trade unions to which the colonies have in recent times given birth. What actions have they taken and what has been their effect ? What, in short, have they done and what are they doing ? Their actions are twofold : contract and battle.

Since one of the aims in forming a union is to reach an agreement with the other party on a new status in their relationship, and to regulate the "work contract" (*le contrat de travail*) let us first consider the *contract*. During the last three years<sup>1</sup> the colonies have developed the collective contract now known as the "collective agreement" (*convention collective*) : a contract concluded between employer and the trade union. A decree of the Governor has now given certain of these contracts the force of law in French West Africa : the regional contract thus becoming a general decree.

<sup>1</sup> [Written in 1942. EOL]

In the mind of the worker the action of his union is nothing less than a *battle* with the employer. Hence he resorts on occasion to the strike : to active and sometimes even armed resistance such as we have witnessed in French India as well as in Algeria. In this latter country there were not less than a hundred and twenty strikes in 1919. They were by no means always trifling ones and they created a new "atmosphere". The French were therefore compelled to pass laws relating to trade unions. Legislation began as early as 1888 in Tunisia, by insisting on a licence before a trade union could be formed. It was not until 1922 that trade unions were recognised in the Regency of Tunis without need for a licence, but on a simple declaration to the authorities—just as in France. In Morocco a *dahir* of 1914 permitted the founding of a trade union, subject to the authorisation of the Sharif Government.

In Indo-China and French West Africa the decrees of 1937 and 1938 permit trades unions to be freely formed without need for a licence, on the sole condition that all their members can read and write French. So far, therefore, the freedom to form trade unions in these colonies is reserved to a select and educated minority. The novel thing about this is, however, that these trade unions have *legal* statutes, *written* statutes, and that the workers who have come from the tribes into the towns to form themselves into trade unions have passed from a traditional, customary and *oral* law to a *written* law, drawn up according to an agreement freely concluded, but framed in conformity with French decrees.

Other groupings introduced by the French are novel in the same way and with the same effect : *work* groups, *purchase* groups, *sales* groups and more recently *credit* groups. All these are voluntary associations.

Of the *work* groups we shall speak when we come to talk of contract law.

The reason why we claim the *purchase* and *sales* groups as novelties is because they were *specialised* groups, each having its own peculiar rôle and function : the joint purchase and the joint sale of such and such specified articles. The French have here divided, separate functions such as were unknown to communities governed by customary law and controlled by tradition. Before the coming of the French these various functions—labour, purchase, sale and credit—were indiscriminately exercised by the traditional communities : the family, the tribe, the village or the household.

When the need arose, *assistance* in the form of food, known as *ma'una*, was supplied free by kinsmen and neighbours to members of the community who required it. Free *labour*, called *tuiza*, was similarly provided by kinsmen and neighbours if they were asked for it, especially for house-building. Free *credit* (*ta'usa*) was similarly provided by kinsmen and neighbours when capital was needed for some obligatory entertainment. These ancient kinsman-neighbour communities, which used thus to serve practical purposes on the material plane, found these activities of theirs superfluous when specialised *functional* groups were formed, subdivided on the French model, each of which played its own particular part in arranging for labour, or credit, or sale, or purchase, on hitherto unprecedented lines.

*Purchasing* groups such as are familiar in France, in particular the "Consumers' Co-operatives" (*coopératives de consommation*) were founded long since in the colonies, first of all in Algeria, almost as early as they made their appearance in the mother-country. The first French society for communal purchase was started in Lyons about 1830. Then, only five years later, a similar society was founded at Boufarik, not far from Algiers in the very middle of the Mitija plain, at that time a pestilential swamp. This is an example of immediate, or almost immediate, borrowing of a French process which was an innovation even in France: the speedy transplanting of this novelty to an overseas country. To-day there exists a more than ten-year-old union of consumers' co-operative societies in Algeria, which is directly linked with those of the mother-country and thus has a national or imperial character. All the joint-purchasing societies of Algeria are already affiliated to the Paris Wholesale Centre (*Magasin de Gros*), which is the headquarters of the Federation for France and for the French Empire.

In the colonies, as in France, the war and the rises in cost were the main reason for the creation of the numerous consumers' co-operatives, societies for bulk purchase and the re-sale to members at lower prices. It is a phenomenon we should note as being a new thing in the colonies. It is novel both in regard to its function and in regard to its constitution.

Its *constitution* is new, since these co-operative groups, which spread as far afield as Oceania and Indo-China, were organised on a basis of equality between all the members, an equality guaranteed by their regulations. The price of the shares is very small, usually twenty-five francs only, so that everyone may be

able to become a shareholder. They are managed by an Assembly, a sort of parliament, to which the directors are responsible for their decisions. The directors are not chiefs, they are called "managers" (*gérants*)—and this title sufficiently indicates the character of these institutions. In the "General" Assembly the members have each one vote, and one only, and "one vote per head" only, however many shares they may hold. This means the dethronement of Capital and of the Capitalist, "industrial democracy" on trade-union lines: equality of written law, government by election, decision by votes, *counted* one by one and not *weighed*. This is an entirely novel phenomenon in the colonies: in a literal sense the rule of number. The French laws regulating these societies "with variable capital" date from 1867 and 1919. Decrees of the Governor-General, the first of which was in 1918, "extend" these laws to Algeria.

The equalitarian régime of these co-operatives, regulated by decree and founded on the *vote*, put them in a category to which customary law offered not the remotest analogy. Under customary law *unanimity* of decision was always sought in tribe or village, and this unanimity was secured by the pressure of the older, the more subtle, the more powerful or the more ruthless—as the case might be—of those who were *respected* and *feared*: but never by the wish of the greater number. Customary law took no heed of a statistical majority—the reason why is clear!

The phenomenon is new also in regard to its function, since these societies are often—just as in France—urban societies, catering primarily for the needs of town-dwellers. They have the double aim of communal *purchase*, and communal *sale* to their members, or to the general public since they increasingly supply the public. They do not work to obtain an immediate profit, an instantaneous return, by selling cheaper than the grocer in the *sug*; they sell at the current "retail" price and *save up* the profit thus made, to *distribute* it later amongst the shareholders. They make a profit, known as *bonus*, the distribution of which takes place only at the end of the year, in proportion to the shareholders' *purchases* not in proportion to their contribution of capital. The number of shares a man holds is of no account. It is the buyer who at the end of the year receives a bonus proportionate to the amount of his purchases. Even in France this was an innovation; it was an innovation in the colonies too: profit regulated by each man's expenditure: in strict proportion or "so much per cent". In Algeria there

was an attempt to introduce in the Tell agricultural groups on the same lines, "village co-operatives" somewhat in the style of Fourier's phalansteries<sup>1</sup> in which life and profit should be, in part at least, communal. From many points of view Bugeaud's<sup>2</sup> villages were co-operative villages, for amongst the soldiers there was common purchase, common work and common profit, the redistribution being always supervised by authority. Bugeaud had been a disciple of Fourier's. It was he who helped to implant this new "co-operative" spirit in Algeria, but . . . amongst the French. Round about 1880 Onésime Reclus also founded co-operative *villages* in Algeria, short-lived and of little benefit to anyone. In our time at least the *societies* organised in accordance with the laws of which I have spoken, are fairly numerous and fairly prosperous in the French colonies. This revelation which the French have brought to the natives has been a success, especially in Africa.

The *credit* groups have been the most successful of all in the overseas countries ; they are scrupulously specialised and technically organised to make loans in case of need. They replaced firstly the action of the communities governed by customary law which used also to make loans, and that free of charge, but only on a small scale and with no advantage to the lender whose free loan often cost him dear. Secondly, they replaced the usurers and moneylenders who used to swarm in the colonies to exploit the improvident peasant who had none of the ideas normal in France about a fixed date of repayment : a definite term of years, months or days after which repayment is due and must be made. There was nothing like this in the customary loans given by kinsfolk or neighbours where repayment was entirely *vague*. With the moneylender the loan is repayable on a certain *fixed date*, and if the borrower fails to pay when the bill falls due, he risks finding his creditor exercise distraint upon him. The borrower must be reformed in his attitude towards *time* . . . These moneylenders in the colonies are often foreigners : Chinese or Chetties from French India ; Jews or Greeks ; in Senegal and the Sudan Lebanese : but . . . there are French moneylenders too. All of these lend only at vast rates of interest and well know how with the lawyers' co-opera-

<sup>1</sup> [See note 5, p. 293. EOL]

<sup>2</sup> [Bugeaud de la Piconnerie was the distinguished French general who carried through the conquest of Algeria, sealing it in the great victory of Isly (1884). He was made Governor-General of Algeria, Marshal of France and finally Duke of Isly. EOL]

tion to turn to their own advantage their right to expropriate the defaulting debtor.

This is why for the last thirty years in the French colonies, and earlier still in Algeria, the State has opened credit-banks, managed and controlled by the State, as is always necessary, to make loans at "reduced" rates, if not always, though often, interest-free. These loans are of advantage both to peasants and artisans. The loan to peasants—agricultural credit—and the loan to artisans—commercial credit—are the two forms of the credit offered, not directly by the State itself, but by associations organised by the French and controlled by the French, while remaining separate from the actual public authorities. "Native Provident Societies"<sup>1</sup> is the name they bear, and this title indicates their novelty. In Algeria as early as 1847 the military had established similar credit banks, though not bearing the later name, whose function was by new methods to provide credits for the natives.

The unprecedented thing they introduce is their system of organisation (*statut*) which was worked out by the public authorities: the *statute-types*, as they have well been called, lay on each society the *duty* of organising itself. These Provident and Credit Societies, whether commercial or agricultural, are therefore not free, voluntary creations. They are set up by the State, regulated and controlled by authority, and their statutes are imposed on the members: the chief obligation being the payment of an annual subscription. If the contribution is not regularly forthcoming, the defaulter loses his membership. This is an innovation. For in olden times, among the undivided communities, which in their way fulfilled the same function as these new provident societies, contributions were collected only by accident and in case of need: *after* the expenditure had been made, or at the time of the outlay, but *not in advance*, as is the case with the European insurance policy. The advance payment is essential in order to build up the funds from which credit can be provided: this is a financial conception linking the present effort to the future.

On all these societies throughout the French Empire their statutes impose another novel condition: their administration or government is placed in the hands of a Council chosen by the French authorities, a *nominated*, not an *elected* Council. There is here no question of democracy or equality, such as prevails

<sup>1</sup> *Sociétés indigènes de prévoyance.*

in the Consumers' Co-operatives, but of a State organisation, founded by and controlled by the State, since these provident and credit bodies are administered by a council nominated by the French authorities. In North Africa the tribal chiefs, who are known as *quids*, have large powers on this Council—which they frequently abuse. It has been discovered that they exact as much as twenty per cent. from would-be borrowers before the Council decides to grant a loan to these members.

Another feature of these societies, especially in Algeria, is the compulsion to join them: the official enrolment, as the order-in-council expresses it. There is no freedom of choice, compulsion has been proved to be the price of success. The individual subscription is very small, but a large membership, enforced as it is, is essential in order to provide "cover" for the loans which will be asked for. It is therefore necessary that all the well-to-do should join as subscribers. At the present moment in Algiers some six hundred thousand natives are members of these societies, twelve per cent. of the population. Enrolment continues according to French credit formulas, which are based on actuarial *calculation* and regulated by the *duration* of the loan for the benefit of creditor and debtor.

Experience has long shown that in these countries only the State could efficiently administer these institutions. Wherever Provident and Credit Societies were founded outside the control of the authorities they proved a failure and were compelled to close down. It has consequently been necessary that each French administrator should assume from day to day the direction of the credit societies in his own district, that he should have the final voice in deciding what loans should be granted. Sometimes loans or assistance are given free of charge, in cases of great need or in cases of calamity; sometimes, and more often, the loans are granted at interest for one year at a low rate so that the borrower is not overburdened. These Credit Societies are based on an original formula, the success of which has been evident in the mineral mines of the Belgian Congo and in Morocco: the beneficial result of partnership between insurance societies and the State. This intervention of the authorities in establishing, guaranteeing, and maintaining, in organising, controlling, and managing, such institutions, is the fulfilment in the colonies of the function, nay the mission, of the *Partner-State*. The State is here acting no longer as merely the direct administrator with powers of command, but as the founder and guardian

of provident insurance societies which presuppose the collaboration of Native and Frenchman. These societies composed of French "subjects" are associated by discussion and decision with the French agents of administration. This is a new aspect of the "policy of partnership".<sup>1</sup>

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<sup>1</sup> Since this chapter was written the vocational trade unions in the colonies, as in France, have been replaced by a State "vocational organisation" (*organisation professionnelle*) of the "corporative" type. See R. Maunier, *Les lois de l'Empire*, 1942, publ. Domat-Montchrestien.





BOOK X  
EFFECTS OF PROGRESS

CHAPTER LIX

LAW OF POSSESSION : PROBLEMS ARISING

The second stage of our journey brings us to the conflict of laws where *law of possession* or land law is involved.

I use the term "law of possession", carefully avoiding the term "property law", in order not to evoke the French concept, and therefore the Roman concept, of rights to the soil, which implies the possession of landed property to use or misuse it at will. The Romans spoke of *usus* and *abusus* : the right of *exploiting* land or *disposing* of it : the power which the owner had, if he had attained his majority, of *using* or of *alienating* his land. This was an absolute and exclusive right, carrying powers which simply did not exist in the customary law of the natives of the French colonies.

Let us therefore speak of the law of possession, the power which they recognised of exercising over their land rights which were always limited, always obscure, always confused, with no precise definition, no certain effect, no exact outline, rights which were more especially not as a rule *personal* but were *collective* rights. In respect of the law of possession the conflict of the State with the pre-existing patriarchal and communal groups was a resounding conflict. Amongst the native populations the right of possessing and occupying land belonged in the first place to collectivities ; communities were defined, in more than one sense, by their relation to the soil ; what distinguished them in addition to their common blood, their common soul, and their common god, was their common labour and their common property.

For convenience sake I have drawn a distinction between the law of possession and personal rights, but the dividing-line must not be too sharply drawn. Inasmuch as the possession of the soil always belongs in the first place—or in the last resort, whichever way you prefer to phrase it—to groups of human beings, inasmuch as it is the assertion of their identity, inasmuch as

they oppose each other and distinguish themselves from each other according to their rights over the land, the right of possession is also a personal right.

The right which the communities used to exercise over the material "goods" which they possessed, always manifested a clear-cut distinction between their rights over the land itself and their rights over its produce. We must beware of equating these things with immovable property or real estate, and movable property or chattels, categories which in French Codes of Law bear too specialised a meaning.

The native law relating to land, and to the possession of land, is determined and marked by the ancient bond which binds a group of human beings to the soil ; even amongst pastoral peoples this bond manifests the utterly sacred character given to the soil by religious tradition. The soil is sacred amongst the most primitive of primitive peoples. The completely savage Australian aborigines, and many other peoples less far removed from ourselves, have the custom of laying a new-born infant on the earth, and thus putting it in direct contact with the soil of its ancestors, the soil which belongs to the founders of the tribe, which is the property of the forefathers. The child is thus consecrated by the memory of the dead, and by this simple rite received into the fellowship of the tribe, a fellowship in which the dead ancestors take foremost place. That is why we must not talk of the "property" of the living owner ; *the land belongs primarily and principally to the dead*, who have rendered it fertile by their sanctity. Even nomad pastoral tribes possessed from all time, as in Australia, circumscribed and limited lands over which they roamed, sacred lands to which they performed rites of worship, conceiving these lands to be a bequest of the dead, as well as the bond and support of the tribe. The same is true, in even greater measure, of settled peoples ! The right exercised over this sacred soil is unique in kind ; hence arises the conflict between the traditions of backward peoples regarding land tenure, and the conceptions of their rulers.

There are three points in particular, sometimes more and sometimes less marked : *vagueness* of land-owning rights ; *complication* thereof ; *occlusion* thereof.

The *vagueness* of land-owning rights might also be termed their *indecisiveness*. In contrast to French methods, native customary law makes no distinction between the degrees, the conditions and the forms of possession bearing on land. The French

distinguish three forms of land tenure which mount *crescendo* in force and value : holding (*détention*), possession, and ownership (*propriété*). The mere holding or occupation is a precarious and fugitive right, whereas the ownership is all-embracing, in fiction absolute, in theory unlimited and unrestricted. Now, backward peoples do not usually make this distinction of varying degrees of tenure. The fact that a man occupies or develops a parcel of land confers on the occupier in his neighbours' eyes rights that are ill-defined, ill-formulated, and imprecise ; rights which are more nearly akin to French "possession" than to mere holding, but are far removed from implying ownership in the French or Latin sense. We shall see how many mistaken conflicts have arisen from the fact that French courts were ill-informed about these native conceptions of land tenure, so far removed from their own, and thus ignored or misunderstood the position of the native occupier, wishing to believe him an absolute owner where in fact such a thing as full ownership did not exist. An English traveller has noted the same misunderstanding in Kenya. Even to-day the natives conceive only of a temporary occupation of land, and have no conception of a title to permanent perpetual occupation. They are always ready to sell their land for a little—a very little !—money ; not until later, after the sale is complete, do they realise—not without resentment—that they have lost their "capital" rights of development. For, without being aware of it, they too have their vital need of *Lebensraum*. They run short of land (I have seen it in certain places in Algeria) because they have sold it without due consideration and without realising that they would presently require more space.<sup>1</sup>

Serious conflicts, sometimes involving fighting, have broken out, especially on the American continent, because the European, with his ideas of ownership, has imagined that a native chief had the power to sell the tribe's land outright and for ever. The purchaser obtained from the chief, and imagined that he had obtained with the chief's full knowledge, the ownership of certain lands—as in Roman or French law ! The tribe protested, for in the native view the chief had no power to alienate the land in perpetuity, certainly not without consulting his tribal brothers.

<sup>1</sup> [Many recent English books published by the Oxford and Cambridge University Presses for the Nuffield College Foundation, the International Institute of African Affairs, by the Royal Institute of International Affairs, and other learned bodies, bear on this and other cognate subjects. The student would do well to inquire about and consult them. I mention in particular C. K. Meek, *Land Law and Custom in the Colonies* (1946). EOL]

It happened in Malaya that the English believed chiefs to possess unlimited absolute and permanent rights over the land, where in actual fact they enjoyed only the use or the usufruct of it. Their rights were distorted and exaggerated by the mistaken assumption that they were owners.

There is secondly the *complication*, or perhaps we should say the *piling up*, of land rights. Various rights, by various persons, under various titles, multiple rights over the same piece of land, coexist at one and the same time ; from the right of the sovereign chief, king or sultan, passing through all the superposed rights of the tribe, the family, the village, and the household, down to the right of the single individual. A perfect pyramid of interlocking though hierarchic rights creates a complication which has two aspects : that of the *holders* (*sujets*) of these rights and that of the *statute* of these rights.

The rights over one piece of land may be subject to various "holders", either collective or individual, whose powers are traditional and may clash not only with each other but with the powers which the newcomers may seek to acquire.

It is true that some vacant or desert lands exist, which according to native customary law can usually be acquired by occupation or development ; lands which are not included in tribal territory, the common property of the tribe, which no one conceives the possibility of "appropriating". The simple fact of a man's settling in an uncultivated spot in one of these countries, developing it and "bringing it to life"—to use the admirable Muslim phrase—secures to him the possession of it, but the temporary possession only, for just as long as he continues to work the land.

Apart from this case, which is by no means common amongst the tribes, occupied land is always overlaid with superimposed rights.

The *king's*, the chief's, right, is pre-eminent and over-riding, and often weighs explicitly on all the lands throughout the country.

The right of the *tribe* continues to extend to all the territories recognised as lands belonging to the kinships within the tribal group. With respect to these lands the tribe may intervene, either by re-distributing the tribal territory as the Germanic tribes used to do, and as do the Moi of Upper Annam, to ensure the "rotation" of the more fertile land amongst the kinships, or by permitting, as in Kabylia or the Negro country,

each kinship to remain permanently on that portion of the tribal land which it has developed. In this latter case of permanent, perpetual occupation, the consent of the tribe must always be tacitly understood and the formal consent of the tribe is necessary if land is to be alienated, and sometimes also to decide the location of the kinship. Even where a kinship group has in the course of time been able to acquire a definite right to the occupation of the soil, it does so only in virtue of its adhesion to the tribe, which imposes taxes or exacts gifts, thus asserting the continuance of its superior right.

The *kinship* or *patriarchal* right exists throughout Islam : the land "belongs" to the family group or rather to its head, as it did in Roman times, but only in so far as the head is considered to be the delegate or representative of the kinship. This was the state of affairs which the French mistakenly defined in their precise language as "property", viz. ownership. In each one of these kinship groups, long since settled on the same piece of land, it is the father or the eldest of the next generation who exercises the rights and is entitled to say "my land", but it is his only because he holds it in the name of the whole kinship. If he wants to lease it out or to alienate it, he must obtain the consent of such of his brothers or sons as have attained their "majority"; and he must for this purpose summon a council such as the Romans called the council of near kinsmen, *concilium propinquorum*, to take part in the transaction.

Nevertheless the *personal* or individual right exists also, if not a right over the land itself, a right at least over the fruits thereof. In Kabylia the right to the yield of the land is a personal right : each of the sons may own the produce of a fruit-bearing tree, or of one branch of a fruit tree. You may often see a tree divided up between several children each having in due season the right to garner separately the fruit from his section. Private rights in the French sense do therefore exist, but subject to all the superincumbent rights of the hierarchic group. The chief of these are the *patriarchal*, the *tribal* and the *royal* rights. Amongst the settled peasantry of the Sudan or of Annam the *communal* village rights often come in too, above the patriarchal and below the tribal rights.

We must also observe how this pyramid of land rights, which in Western eyes often strangely obscures the situation, is almost always accompanied by an inviolable rule which denies the rights of possession to a *foreigner*. Since the soil is sacred to the

tribe, it cannot pass to any stranger to the tribe. Almost everywhere in the French colonies this was the first shock caused to the natives by the French occupation : in Muslim countries in the first place, but no doubt in other countries too. The old customary law never recognised a stranger's right to possess or acquire land. It was not until 1863 that the French were able to overcome this obstacle in Algeria. Only recently have they succeeded in doing so in Egypt, Tunisia and Morocco.

There is ample complication involved too in the *statute* of the native laws of land tenure. These pyramids of superposed rights are not all subject to the same regulations. In one and the same country we find several different systems of land law co-existing, and that not amongst the ultra-primitive only, but amongst the more advanced or the less backward. This applies particularly to the Muslims who have a long history behind them and who have innumerable blendings of populations. There is the rural system and the urban system ; the system of the plains and the system of the hills ; the Muslim system, with its four strongly divergent rites, and the Berber system and in the Negro country the "fetichist" or tribal system. In the Far East we must distinguish the Malayan system from the Muslim system, from the Javanese system and from the Indonesian system of *Adatrecht*, all of which vary greatly in different regions. These are all widely divergent.

More than this : even in certain countries very strictly regulated and undivided by Muslim law, there is neither unity nor simplicity ; for Muslim law does not even yet recognise the status of possession. It still distinguishes, and in the past distinguished still more clearly, between two types of real estate : *decimal* lands and *tributary* lands. "Decimal" lands were territories that were Muslim lands by origin and had never been conquered by the sword ; "tributary" lands were territories seized in conquered countries where the natives had resisted the Muslim invader and had been enslaved and were permitted to remain in possession only under restrictions, and under taxation which weighed heavily on their activity and prosperity. Considering only Muslim law, there is great diversity both as between one country and another and within the same country, under the influence of often divergent rites and of the various systems of customary law which Muslim law has been able only to overlay but not to abolish. In these countries there are various social strata one above the other simultaneously existing or

surviving : the tribe and the town ; the backward stratum and the advanced, and between these extremes many intermediate strata ; these involve the same number of traditional systems piled one on top of the other with the passage of time, the newer not completely obliterating the older. There exists every degree of transition from *tribal* to *royal* law.

Lastly there is the *occlusion* (*occultation*) of land rights ; let us coin this phrase to meet our need. There are veiled and hidden rights, undeclared and unrevealed, to which the French colonist had often no means of finding the clue. These rights were never publicly stated, for according to ancient custom they were never registered nor written down. The French purchaser of land might find himself helplessly exposed to interferences and claims founded on native custom. Amongst the natives everything rests on and is guaranteed by simple tradition, which is the saying of the greybeard passed on to his children and by them in turn to their grandchildren. It is the elders who are believed to be informed of all acquired rights ; surveys and registers are . . . in their memory ; and their memory is the only title-deed of possession. If, as may happen, they have been mistaken, or if they have deceived others, this means or may mean uncertainty and insecurity for the French purchaser : he has no means of proving his rights, or of proving that the seller had the right to dispose of the land separately without the intervention of his co-possessors, kinsmen or neighbours.

There was one country where, before the coming of the French, the natives had themselves organised a measure of semi-publicity for the possession and transfer of land. In the Empire of Annam the Emperor Gia-long—the same who had issued advanced Codes of Law—had drawn up a Land Register called *diabo* for each village. Certain notables, who formed a sort of communal council, were entrusted with the task of entering in the register all transactions relating to land. This registration lacked, however, the guarantee of accuracy which to our thinking is necessary to make these entries trustworthy : so much so, that customary law did not recognise them as proof of the transaction. An entry in the *diabo* created a presumption, but nothing more than a presumption, and not valid proof (*moyen de droit*) of title in the French legal sense.

Nowhere else in the French colonies was there any method of securing publicity for transactions relating to land. When a French colonist proposed to purchase a piece of land, he never



knew but that kinsmen or neighbours might lodge claims against him in virtue of rights which had been neither revealed nor declared, and against which he had no means of protecting himself.

There were two great ambiguities which had to be anticipated : *non-division* and *dedication* (*affectation*).

Normally and usually, family territories remained undivided and not separated into individual shares. At best, the power to dispose of or alienate a piece of land did not rest with the person in possession, but according to custom with the *pater-familias* and sometimes with individuals. When a purchaser turned up wishing to acquire a piece of land, he did not know that it was the undivided property of several persons, that the kinsmen, and especially the brothers of the man offering it for sale, might claim that their agreement was violated and might invoke that ancient right of redemption (*droit de retrait*)—which used to exist also in France—known to the Algerians as *shifa'a* ; the right which kinsmen or even neighbours enjoy of preventing a sale by repaying to the buyer the purchase price he has paid. This right of redemption by kinsmen (*retrait lignager*) or by neighbours (*retrait vicinal*) is current throughout Islam. The undeclared non-division of land proved a great obstacle to the French in developing their colonies.

The second difficulty was the *dedication* (*affectation*) or appropriation of land to special purposes, especially in Muslim countries. Many parcels of land were dedicated to, or sequestered for, certain charitable or religious foundations and could neither be sold nor distrained. These immobilised lands were known as *hubus* in the Maghrib, and as *waqf* in Egypt. They were consecrated, always in perpetuity, to some "pious purpose", such as the founding or maintaining of a mosque (this was the most usual purpose), but frequently also to some scheme of charity or almsgiving—for the "public service" as we should say—such as the construction of a fountain to relieve the thirst of the humble passer-by. Similarly a well-to-do house often displays outside, a fountain for public use with an inscription of some text of the Quran to invoke blessing . . .

The occlusion of land rights is aggravated by the procedure of customary law especially in the matter of proofs. Peoples who cannot write can obviously not rely on written title-deeds ! Even amongst Musulmans, who have from ancient days possessed the art of writing, an oral proof by witnesses was preferred to

a written title. In seeking to purchase land the French colonist came up against the difficulty of being opposed on oath, though the oath might be falsely sworn—a matter in which native public opinion was tolerant when swearing to a foreigner's disadvantage was in question—kinsmen and neighbours of the seller averring that the land belonged to some third party and that the apparent possessor could not legitimately dispose of it. The colonist was thus estopped.

Vagueness, complication, occlusion, all these were ramparts reared against the title of a foreign purchaser, ramparts which had to be demolished or at least circumvented. Such was the state of affairs in regard to land tenure, but there were other barriers which had to be broken down concerning the disposal of *tools* or *products*. The right over tools or implements was usually a *family* right; the right over produce was a personal right: for the produce of labour went to the labourer. Amongst the Algerian Berbers there were even goods which belonged privately to the women or the girls, being the products of their personal toil. Pottery, eggs and clothes were female property, profits to which the women were entitled, because they were the product of women's work, and only the woman had the right to dispose of them.

These rights over tools or implements, and over products, preserved among the more primitive folk some traditional features which from the very start provoked and unleashed opposition between the European and the indigenous native. For the personal right over tools and products did not enable the possessor to dispose of them fully and completely. The man who possessed such goods in "his" house or in "his" field was free to sell them only for the benefit of his kinsmen or neighbours. Any neighbour or relative had the right to seize another kinsman's tools or crops if he required them. There prevailed a type of "communism" or, more accurately, of communal ownership which was very marked. As a traveller in the Hottentot country vigorously phrased it: "in this country it is the duty of the provident to feed and support the improvident." When you kill one of your sheep, you must share it. It is not seemly, it is not lawful to keep your produce for yourself alone. As early as 1810 an English traveller recorded that the natives having heard from explorers the European view of private property were beginning to hide themselves away when they slaughtered a cow or a sheep, to avoid having to share it with others. In

all these countries the tradition ruled that you must always allow your "friends"—and the circle of friends was wide—to have at will the free use of your movable property when they needed it.

It was held to be incumbent on the possessor to give, and in case of need legitimate for the needy to take: so ran the customary law. That is why we read in travellers' tales of Oceania and even of Africa that from the very moment of their landing Europeans have had reason to complain of frequent thefts. The eager and excited natives flung themselves at once on the newcomers: they laid hands on all the objects they had never seen before and indiscreetly carried them off to admire them. Explorers' protests against these perpetually repeated thefts are a commonplace of travel books. Lapérouse said that he had scarcely set foot on Easter Island before the natives had stolen all the sailor's hats and handkerchiefs. With their ideas of the community of movable possessions they imagined that they had every right to do so. Half a century later Dumont d'Urville wrote of the "barefaced thieving" of which his companions were the victim: the natives swarmed on board his ship and carried off everything they could lay hands on. He wanted to punish them; they "blazed with anger" and "became more active than ever" in their pilferings: neat-fingered as they were, they made tools and instruments disappear as by a conjuring trick. What better example of misunderstanding could we ask for! In these enchanted islands no man had the exclusive right to any movable possessions; kinsmen and friends were entitled to help themselves to them at will! The famous slogan of last century "To each according to his need" is—or was—valid in these distant lands in regard to all movable goods.

Yet another conflict must be mentioned to which these movable goods gave rise. Not only did almost compulsory giving and taking of them prevail, but the *destruction* of these articles was often also rendered obligatory by tradition or "superstition". When a kinsman died, his personal possessions had to be buried with him, as in the time of the Pharaohs; hence it comes that the modern excavator is fortunate enough to dig up ample treasure. Goods thus buried were withdrawn from circulation, figuratively and symbolically destroyed. It was often the custom to destroy them even more effectively by burning them, or, if animals were in question, by slaughtering them in thousands, as was the practice in the Celebes. The age-old custom of sacrificing

animals on the death of a king was one against which the rulers had to struggle in the interests of the natives themselves who used blindly to kill off all their live stock ! The Old Testament tells us that on one occasion the Hebrews slew a quarter of a million lambs and horses ! This phenomenon recurs in distant countries where religion and tradition compel the native to slay his cattle by fire and sword and thus to ruin himself by destroying his own capital wealth.

Such are the problems raised by the law of possession. The solution of these problems demands our attention.

## LAW OF POSSESSION: SOLUTIONS SOUGHT

The French rulers' task of reforming the law of possession, both *de facto* and *de jure*, was to fit it for a new "climate": a new mental climate to meet a spiritual need; a new practical climate, to meet a material need.

The new spiritual need lay in the French administrator's passion for having everything clear, precise and certain. The French want always to understand; obscurity must therefore be, as far as possible, got rid of. They want clarity. It was this instinct of theirs which led them to alter the law of possession in order to clarify and simplify it.

The new material or practical need was their desire that the French colonist developing the country should be secure in the enjoyment of whatever rights he had acquired. Customary law was ill-adapted to this end! The need of something *clear* is a mental need; the need of something *certain* is a practical need. The French want both enlightenment and guarantee; they want to know, to act, and to keep.

With these ends in view the game of law-making began. Four methods came into play.

First, they *confirmed* the ancient custom and going further *restored* it if it had lapsed.

Secondly, they *abrogated* the old law if they found, or thought they had found, that it did not satisfy their two requirements of fixity and security.

Thirdly, they *reformed* it wherever they thought that the old custom could be allowed to continue if adapted to modern needs.

Fourthly, they *imported* and transplanted to the colonies a French law, which the natives had hitherto neither known nor heard of.

Let us now examine these four procedures in detail. First, they often thought—rightly or wrongly—that it might be of use to *confirm* and maintain the traditional law of possession, and strengthen it by what they call "improved" procedures.

This is what they did after considerable wavering and hesitation, in respect of collective properties, "tribal territories" in Algeria, Tunisia and Morocco. They thought the wisest thing

was to preserve the tribal system and so to restore vigour to tribal life. It would therefore also be wise to protect tribal possessions. In the Maghrib this was done in three ways : by *determining, delimiting and verifying*.

By legal texts they *determined* and defined the tribe's rights, having first defined the tribe itself, and given the group its own identity by conferring on it a legal personality. It was given the right to trade, and the right to plead in courts of law, but its power of alienating the common tribal property was limited. This was the purpose of the three land laws passed in 1863, 1873 and 1897 in Algeria. These laws defined the collective tribal lands, the *arsh* lands as they are called in Algeria and Morocco ; these were legally "constituted", as the expression was, and it was precisely laid down—this was the new factor—that the collective tribal property should be, more strictly than it had been in the past, inalienable, non-distrainable and imprescriptible ; that is, that it should for ever remain the perpetual property of the tribe. In Morocco it was a *dahir* of 1919 which formally granted "personality" to the tribe. This *dahir* regulated the assembly, the *jama'a*, its composition and its constitution ; in particular, in respect of land law, it reduced to writing—not as of old leaving to oral tradition—the attributes of the tribal estate : this was to be indivisible, non-distrainable and inalienable, and so it remains except in cases of alienation for the benefit of the State. There was thus confirmation and conservation but, in this particular point, alteration. Let us fully realise that in all this everything was mixed. In Tunisia a decree of 1936 established the personality of the tribe and legally reduced to writing the tribe's right collectively to own the tribal territories.

This law ordains that "property" in land belongs always to the whole tribal group ; and that as in Algeria and Morocco, tribal territory is inalienable, indivisible, non-distrainable and imprescriptible ; it is common tribal property. Further, the rights over the tribal territory which are granted to kinship groups, are rights only of enjoyment or of usufruct. There is no longer to be the old periodic redistribution of tribal lands. Kinship groups have from time immemorial been settled on their own reserved lands. These laws, however, following the spirit of tribal law, recognise the kindred as usufructuaries only ; they are entitled only to the use and enjoyment of the land, sometimes as groups, sometimes as individuals ; they are cultivators but

not owners. The Tunisian decree of 1936, under the same inspiration as the Moroccan *dahir* of 1919, nevertheless made a change in one point, one point only, of the old tribal system. It gave permission to the Bey to establish by decree individual properties with exclusive title on tribal territory. Whenever this territory is judged to be more extensive than is necessary to meet the tribe's requirements, the Bey is allowed to make a decree creating individual rights in the soil. From more than one standpoint this was a great innovation, but it remains of secondary importance since the object of the 1936 decree was to confirm the tribe's rights over the tribal territory.

The procedure of *delimitation* was another French invention to consolidate collective rights. Before the coming of the French inter-tribal quarrels about boundaries had been a curse in the land. To prevent these the French made use of accurate geometrical surveys—previously unknown to the natives—in Algeria, Tunisia and Morocco. They are not yet everywhere complete, but they already cover the plains and towns.

Their final method of working out guaranteed, certified rights in their colonies was to ensure these rights being *verified* by entry in the land register. In these distant countries where "matriculation", namely, land registration, largely based on the Torrens system,<sup>1</sup> has been introduced, the result has been that rights thus verified and registered have been granted by the Administration. It matters little whether such rights are, as the case may be, collective or individual; they are strengthened and confirmed for the native by the intervention of the French authorities under these procedures. Rights over the land are henceforth attested by the public authorities at the same time as they are *moulded* by the European survey system, which the French are introducing with increasing speed into their overseas dominions. Let us remember that in Cochin China it took them ten years to make a complete survey of the country . . . by aeroplane. It was thanks to aerial photography that this enormous task was accomplished.

In many respects the French have brought not confirmation only but *restoration* also. They have not only preserved what they found still existing at the time of their arrival; but they have reconstituted a more distant past which by that time had already disappeared. By making use of customary laws that had persisted only in out-of-the-way corners and had disappeared

<sup>1</sup> [See footnote, p. 708. EOL]

in other places, they re-educated the natives in these long-forgotten ways, always believing—rightly or wrongly—that this would be to the benefit of the native as well as of the French. They thus revived local customs as well as helping them to survive. In Madagascar, for instance, there were communal groups known as *fokonolona* in ancient villages, with territorial rights which had disappeared in many regions and only persisted in scattered districts. Various French decrees extended them to the whole island, thus re-creating and bringing once more to life a past already dead.

In the second place the French took the step of *abolishing* the old traditional land tenure system. Whenever it appeared to them, hastily and suddenly sometimes—the military were not over-patient folk—that the ancient system was only a nuisance, and could in no wise be adapted to the French aims of achieving fixity and security, they just deleted the old customary law. They did this in two ways, or rather in two degrees : sometimes *completely*, sometimes only *partially*.

They *completely* abrogated the traditional land law whenever land registration had been imposed on their subjects and made compulsory. Such cases, however, were exceptional, for in the French Colonial Empire the whole system of land registration was usually *optional* : the natives *could* avail themselves of it if they found it convenient ; they were *not bound* to use it. When once the registration system is made compulsory, it sounds the death-knell of the olden ways. For the primary object of the land registers is, by the entry in an *ad hoc* record-book—registration was of course an entirely new idea to colonial peoples—to create a new right and a new title, a public, administrative title. Once a title has been registered, no rights can thereafter be validly transferred except by an entry in the official record made by some quill-driver of the Administration ; without this decisive rite there is no salvation. The registration implies and carries with it the “purge” of all older rights, that is the annulment of all earlier titles without limit or exception, though in Morocco an indemnity is paid to earlier occupiers who may suffer loss on the introduction of the new system. Not only has this rigorous procedure been recently carried through in Cochin China ; but the same result has been achieved in Algeria by another method of which I have spoken elsewhere, a method less radical, less absolute, but tending to produce the same effect : namely, the frenchification of immovable property under the



laws of 1873, 1887 and 1926. The French have not yet made this obligatory ; it is still simply optional ; but when it is adopted the result is to bring landed property under French law at the demand or request of the parties interested.

In the early days of the French occupation of Algeria they went further—we might even say too far—and after the usual manner of conquerors they confiscated the territory of the tribes ; this was one way of suddenly, brutally, wiping out the old land tenure system. If the State thus took possession of tribal property, it had its arguments, at least its pretexts, for this course. It did not want to seize land simply for the sake of seizing it. Sometimes it was the property of conquered tribes who had resisted and been defeated ; sometimes it was uncultivated land which needed to be developed. This was in accordance with Muslim tradition which holds that you may take possession of dead land which the occupier has not “brought to life” by clearing and cultivating it : the right of occupying being justified only by the process of developing. In Muslim eyes the man who ceases to work his land ceases to possess it, if his failure to cultivate has continued for any length of time. Stretching this Muslim tradition unduly, the French confiscated a great quantity of land which they were then able to sell or to give to their own immigrants. It was only the law of 1851 which put an end to these confiscations. After that and until the law of 1863, there was nothing but the *cantonment* system, of which I have also spoken, when the tribes by agreements and conventions accepted by them—this was at least the fiction—were herded into a smaller area, and the excess land, too extensive for their means or their needs, could be absorbed into the public domain. This procedure was abused, but on paper the *cantonment* was carried out by contract and the tribe was held to have resigned itself thereto.

These are cases where the total abolition of traditional land rights was realised. Often the abolition was only *partial* : the old land law was softened rather than abolished whenever it threatened to impede the exploitation of the “new country”. Certain features of it were destroyed, but not all. This intervention of the authorities in the occupation and development of landed “properties” was a new phenomenon for the natives. This “State Control of Land” (“*étatisme terrien*”), as we might call it, in colonial countries was a fact before which even the most liberal of Liberals had to bow. Leroy-Beaulieu recognised that in these countries the State must at every moment intervene

to govern and control. This is particularly true in matters relating to real estate. The partial abrogation of customary land tenure had as its aim and its result the intervention of the authorities in the parcelling out and development of rural domains. The function, the duty, the mission of "property" in the colonies—by which we mean the system of land tenure prevailing in France under French Law—is the "development of values" (*mise en valeur*) to the enrichment of the population. This task is accomplished under the incessant control of the French Administration.

This partial, not total, abrogation has followed two courses according as the traditional system has been replaced by a *special law* or by *French law*.

Sometimes a *special, ad hoc* law has been set up instead of the traditional system of land tenure, which is not identical with French law. The law of 1851, which I have already quoted, established in Algeria a law *sui generis*—which has survived and is applied to all non-frenchified lands that are not under French law—a special or, as it has been called, a *mixed* law, some of whose features derive from French law, and some from the old customary system.

More often partial abrogation has made way for *French law*. Laws and decrees, *dahirs* and orders issued by the governors, and even *circulars*, which are in a sense also laws, have piled up, imposing changes on the pre-established land law—which the French intended to maintain and preserve—changes which increasingly nibbled it away. Restrictions on the customs prevailing prior to the French occupation mounted *crescendo*; these restrictions were prompted by two sets of considerations: those of *morality* and those of *utility*. Where the old law seemed in French eyes unjust, *morality* came in; this was especially the case as between creditor and debtor. Thus the rate of interest on land loans was fixed in the colonies. It was more usually practical utility which came into play, however, for the traditional system of land tenure was compromised in French eyes chiefly because it galled the French colonist seeking to develop the land.

To the native subjects of the French, "property" was a matter of tradition and continuation or of memory; a man possessed land by virtue of his dead ancestors, and maintained it for his posterity, far more than he worked it for the living, whether near or distant relatives. To the French, on the other

hand, the function of property is development for the common benefit, present and future, of rulers and ruled : this function is guaranteed by restrictions imposed in the public interest on a man's freedom to use the land and also on his freedom . . . not to use it. For he *must* work it, on pain of eviction or revocation by the authorities of his rights.

These restrictions continually increase. There are the regulations of town life which forbid you to build as you like, to repair or pull down at your own caprice. There are the regulations of transport and highway codes, of irrigation and drainage. There is, as in France, the possibility of being expropriated for the public good, for utilitarian ends ; there is the power, of which traditional custom knew nothing, to deprive a family group of its land for some such simple reason. Here was a conflict ; here was need to complete the native's education. Then there was the prohibition of certain crops, hashish and tobacco, for instance, the former for moral, the latter for fiscal reasons. Then the abolition of collective tribal cultivation which still continued in backward countries. A decree of 1936 forbade communal agriculture in French Equatorial Africa. The tribal land is still communally owned by the tribe collectively, but the cultivation of the land must no longer be carried out collectively : each man in his own field works as he will. Similarly in Morocco, kinship groups are free to cultivate a portion of the tribal territory separately and distinctly by their own labour and for their own profit. There is also the prohibition against excavating ("*fouiller*") the land in the search for "antiquities". In Egypt and Morocco these things have to be licensed and controlled. This is the cause of serious conflict which is still acute between the native and the authorities ; the solution not infrequently is : fraud. Finally, to quote a very recent decree of April 25, 1937, certain sites and monuments throughout the whole French Empire are proclaimed "protected" ("*classés*") ; this restricts a man's right to destroy the beauty of his property.

Thirdly, there was also the *reformation* of the old system. Whenever it appeared that the new French desire for fixity and security could be satisfied by preserving the old traditional unwritten and uncertain rights, and just modifying them to meet the new requirements, the French passed laws for the purpose. As a general rule these reforms in the colonies have rightly been made *optional*. Suggestions have been made, point-

ing out to the natives how their own best interests would be served by giving up *some* features of their land tenure practice, by blending and reconciling the old system with the new, thus rejuvenating and refreshing it, and thus allowing it usefully to survive in a new order.

This reforming process followed two lines. Sometimes certain features of *French* law were introduced into the old system, yielding a mixture, or a cocktail if you like, of the old law and the French Civil Code, in proportions varying, as you might foresee, according to places and peoples. Sometimes a new special law, *sui generis*, was inserted into the heart of the old system, an exceptional law specially worked out for the particular country in question. What we might therefore call a *colonial*, not a *national* law.

There was first an admixture of French *common* law. This was used in Algeria for the *arsh*, the collective tribal territory. A law of 1926, aiming at frenchifying the tribal territories, permitted the alienation in certain exceptional cases of the *arsh* lands. This dealt a blow at the old tradition that tribal land could *never* be abandoned. Thereafter, in Algeria, Tunisia and Morocco, it was possible on occasion to waive this principle, thus altering tribal law by blending it with French law. In Morocco a *dahir* of 1928 "regulated" the *shifa'a* in the same spirit: the *shifa'a* was the right enjoyed by kinsmen and neighbours to cancel a contract which alienated landed property and to eject the purchaser by repaying the purchase price. This right was restricted, but not wholly abolished by the new *dahir*: this involved a weakening of the old system by blending it with French law.

The French acted similarly in Madagascar, when their decree of 1926 reformed the system under which witnesses were allowed to prove land rights: and we all know the value of a witness's evidence in colonial countries! Even if there are numbers of them, even if they all corroborate each other, they are not necessarily witnesses to the truth! In Madagascar the French insisted on the actual fact of "occupation" duly verified, to support the proof by witnesses; this was not, strictly speaking, to abolish the proof by witnesses, but only to modify and reform it.

Alternatively the mixture contained a special law as one ingredient, an exceptional, *ad hoc* law deriving from French common law. This was the method used for the *hubus* in North

Africa. The *hubus* or *wagf* is what is known as *mortmain* (*main morte*) property, namely land set aside, alienable and imprescriptible, to be devoted to some charitable or to some religious purpose. The rights in such mortmain land were not publicly known, but were veiled, and since the French could not dream of abolishing these pious foundations which the natives regard as sacred, they have confined themselves to limiting the exercise of these rights only in so far as they were inconvenient to French purchasers of land. In Algeria an order of 1844 and particularly that law of 1851 of which I have spoken, decreed that *hubus* rights were valid only *between natives* who were adherents of Islam, but were not operative in respect of French or European persons. The prohibition against the sale of *hubus* land did not apply to the sale thereof to French colonists. There was thus *limitation* of the old traditional regulations in regard to *certain possessions* and to *certain persons*. The institution itself is not abolished; but it is narrowed or trimmed since it can operate only between Musulmans and not where a European is concerned.<sup>1</sup>

<sup>1</sup> In Tunisia a decree of the Bey, dated June 4, 1940, and a Moroccan *dahir* of November 2, 1940, reinforced the control over a tribe's enjoyment of its collective tribal lands. By these, the tribes were placed, as we know, under the direction of "Guardianship Councils" (*conseils de tutelle*).

## LAW OF POSSESSION: NEW PROCEDURES

We come, finally, to *innovation*, which brings to the native inhabitant an unknown canon, an unheard-of system, *revealed* to him by French intervention. Until there are roads, there can be no Highway Code; until railways are built, there can be no railroad regulations; "no aerial law" before the aeroplane! These are entire bodies of regulations transplanted from France to the colonies to meet new circumstances.

Innovation, transplantation, frenchification, have all been used in handling matters of land tenure, and have affected three things: the *persons* concerned, the *methods* employed and the *effects* of land law.

As for the *persons* involved, the principal innovation, as you can easily imagine, is the conception of landed *property* in the Latin and French sense; private property whose owner is an individual not a group; property which is always saleable, always transferable, taxable and distrainable according to French law. We cannot sufficiently realise the fact that the French introduction into the colonies of the conception of property owned by one individual who is free of all ties to his own group—whether of kinsmen or neighbours—has wrought a revolution in land law.

This is not to deny that amongst certain overseas peoples a movement in this direction had already begun. There is one in all the countries of North Africa, in the Egypt of the sultans and nowadays of the kings where progress was made spontaneously, in isolation, without European intervention to "personalise" or "individualise" the ownership of land. More extensive rights had gradually been accorded to individual occupiers of land by a first edict of 1813, a second of 1846 and by the laws of 1854 and 1858 known as the "territorial law". In earlier days under the Turks the land, for instance in Algeria and Tunisia, was the property, the eminent domain, of the Sovereign.

In Egypt, the law, especially the law of 1854, following the 1846 ruling, granted the possessor the right of sale or disposal without interference by the kinship group.

The law of 1858 granted the individual the right to succeed

to land on his personal title and to dispose of it privately by will. This established a man's power to inherit and to alienate his land; it was therefore *abusus* in the Latin sense and from this point onwards we can speak of landed "property".

In Algeria the French authorities tried in the law of 1863 to establish property in land by securing for the Algerians the power to acquire land and dispose of it without family interference. The aim of the law of 1863 was expressly, as its very name announced, to "constitute" in Algeria individual right to possess and to alienate land.

Twenty years earlier, in 1845, Bugeaud, the re-converted disciple of Fourier, had tried to get the individual's title to landed property recognised, and to permit Algerians to acquire landed estates in accordance with the French Civil Code. The consequence of this would have been to give the owner freedom to alienate and the right to demand the sale of an undivided inheritance and the allotment to him of his due share therein, what is known as the right of *licitation*. This right he could vindicate in the French Courts and thus secure an order for a judicial auction. This was eventually accomplished by the law of 1863, the French believing that they were releasing the natives from the galling burden of family rights by putting an end to the non-division of property jointly held, a thing which always hampers development. Now, see what happened! Less than thirty years later, in 1891, Deputy Burdeau, making investigations in Algeria, was obliged to observe all the evil and the harm that had there resulted from *licitation*, namely, the public auction and the sale of inherited land to "the last and highest bidder" before the Courts. Amongst the heirs there would be found one who surrendered his share to a stranger, to a moneylender, a Frenchman, perhaps, or a Jew; and the moneylender, fortified by French law, immediately demanded from the Courts the sale and division of the property. This entailed the ruin and dissolution of the kinship group, whose strength and support had lain in their common and undivided possessions; and thus the French conceptions concerning the liberty to dispose of a joint family inheritance, were abused. This occurred at the very time when other countries, notably the United States, were already considering the re-establishment of non-division in order to prevent the dissipation of the family patrimony, and were picturing the *homestead* as just such an inalienable, non-distrainable, imprescriptible possession as it was in Muslim law. This

was the moment that the French in Algeria took on themselves to give to the joint heirs of an indivisible property the power to demand its division by judicial auction before the French Courts. There has been much talk in Algeria of this ruinous misuse of licitation, the result of which was to encourage instead of putting an end to usury! The English, however, made the same mistake: since before us they had the desire to "liberate the soil" in India, to individualise the land system by granting the occupier the unrestricted right of acquisition, alienation and disposition which was not admitted by Indian customary law.<sup>1</sup> In 1793 an ordinance conferred on tenant-farmers from father to son—who were in fact cultivators but not owners of the soil—the *zamindars* as they were called, the option of becoming owners with a personal title to the land, and thus the right to dispose of their lands by mortgaging them to their creditors. After some time the English, who are good sportsmen, readily admitted that they had made a mistake and had misunderstood the customary system of land tenure. Misled by bad translations, they had mistakenly believed that these tenant-farmers were owners in the English sense, and had the power to pledge or mortgage their land as security. This, however, was not the case; the *zamindars* were settled on their plot of ground as cultivators from father to son, but not as owners.

The same mistake has been committed almost everywhere. More recently in New Zealand it was thought that the Maori who was found in occupation of a piece of land was an owner, a *freeholder* in the English sense, who therefore had the right to sell if he wished, and who could be expropriated if he thoughtlessly over-borrowed, or if he accepted money for his land, money which he often squandered in a few days, thus losing both his money and his land. A treaty concluded by the English with the greatest of the Maori chiefs introduced a whole new system of land tenure under which landed property could be sold without hindrance of any sort and without any protection

<sup>1</sup> [This question is not so simple. There never existed one "Indian Customary Law" in India. Even Hindu Law, based on sacred Sanskrit texts, has two schools of thought which differ on the questions of joint family property and "co-parcenership", inheritance, succession, etc. Muhammadan Law again is of course radically different from Hindu Law, and is also sharply divided into the two schools of Sunni and Shiah thought and practice. Even in the days of the East India Company, the charters enjoined that to Hindus and Muhammadans "their own laws both in regard to inheritance, succession and family law should be applied and also in matters relating to religion and caste". This has always been British principle and practice. See *Encyclopedia Britannica*, 14th Ed., s.v. *Indian Law* and the articles and authorities there referred to. EOL]



for the vendor. Whether he borrowed, or whether he sold, he ran the risk of finding himself bereft of his heritage without compensation. This was a very real danger amongst people so carefree and improvident as the Maoris then were—whatever they now may be.

In Morocco the freedom given to the natives to dispose of their landed property without restriction according to French law, has done them immense harm. They have sold lightly, lured by the bait of immediate gain, without thought for the future. Sometimes they sold in the foolish belief that the French would be driven out and that they would automatically recover their land without moving a finger! So they lost their land and, as you might expect, within a few days or months their money too was gone. In their pride and excessive zeal for legislation, the French positively did harm to the Moroccans by seeking prematurely to give each of them the power to control and sell his land, and to release the individual from the pressure of his kinship group, which had in fact previously been his bulwark against folly.

In Negro country the current idea is to individualise the ownership of the soil and thus to create what it is the fashion to call a "peasantry" (*paysannat*). The French have successfully encouraged native colonisation in Madagascar, in their West Africa, and more recently in their Equatorial Africa. The Aofians and the Aefians—as they are now called, namely, the natives of West and Equatorial French Africa—are already familiar with the individual's right to own and to alienate land. All the *Negro peasants*, who have cultivated cotton and ground-nuts, and recently with only too much success cocoa and coffee, in Senegal, the French Sudan, and Togoland—as also in the English Gold Coast—possess individual titles to their land, titles governed by French Law and carrying the right to alienate and the duty to exploit. They are henceforth closely controlled by the French authorities. The *peasantry* as it grows extends also the area of *property*.

The legal *methods*, the procedures open to the owner to guarantee and to preserve his rights, are the major innovation: they depend on *registration*. The entry in a register of all landed properties had produced the indirect effect of altering the old system of land tenure; in addition it is in itself an innovation or new invention; for its object is to establish rights in land, and to transfer these rights in virtue of their registration in an

appropriate record, the *registration* being carried out under the supervision of the French authorities. The transfer of real property rights became a matter for the State ; it is a public not a private transaction since it must bear the seal of the Administration. The written word constitutes the title, as it did amongst the Ancient Romans. In the French colonies they always advance from oral to written law. Proof of ownership resting on the evidence of witnesses is eliminated. The guarantee of acquisition and preservation lies henceforward and exclusively in the records of the Administration. This is nothing less than a revolution in the native's ideas of possession. Possession used to be guaranteed by orally transmitted tradition ; henceforward it is guaranteed by the formality of registration. This formality is, as we know, insisted on in the colonies, not only as in France in respect of third parties, would-be purchasers who would not yet have registered ; but it is also insisted on—this is the radical innovation—between the contracting parties, *inter partes* ; the transaction *in itself* is valueless unless it is recorded in the *ad hoc* register. One of the two contracting parties could therefore point to the lack of registration which makes the transaction null and void. The *real* contract is the *recorded* contract, which has no validity save in virtue of an entry in the register, duly made in the office of an accredited functionary who has, as is fitting, been duly sworn in.

As to the *effects* of the innovation in land law, the implications of land ownership have changed completely and in two different directions. In one direction they are *increased*, in the other *diminished*. Under the new system the possessor of land has on the one hand a credit balance, and on the other a debit balance, compared with what he enjoyed under the old system.

His rights are *increased* in this way : formerly he enjoyed only the right temporarily to cultivate, the *usus* as it is called, or the usufruct for life. On every hand he came up against other rights overriding his own, family rights, communal rights, tribal rights and often also royal rights. These superior rights hampered his freedom of action. Even his right to cultivate and use his land to advantage, was controlled by kinsmen and neighbours ; the *paterfamilias* was not in control of his own affairs. Neighbours and kinsmen perpetually interfered, principally in the matter of the rotation of crops. In practice, tradition compelled him to consult the kinship or communal group at every turn. Under the new system the individual,

the one *particular* private person—the various laws and decrees use this very word—is free to cultivate in his own way without consultation and without interference. In the matter of *cultivation* and development of his land his rights are increased. In the matter of *alienation* his rights are also increased. He now has the right, which he did not before fully enjoy, to insist on the division of undivided land and to obtain his due share. Being now the proprietor, and not merely the occupier, he is always entitled on the death of his progenitor to demand licitation from the Courts ; to insist on the joint inheritance's being put up to auction and his share's being given to him in money . . . paper money. Most important of all, he now has the right to *dispose* of his land : this is technically called the *abusus*, the option, of which he avails himself more and more frequently, of selling his land for cash—which is spent all too soon in the market. The novel joy of having a bank account and a cheque-book is already familiar in Senegal and the French Sudan. This means *mobilising* landed property, as the phrase runs, by allowing its free circulation and letting it change hands without difficulty of any kind : but by no means without harm. Now, according to the tradition of customary law, though the right to alienate was in exceptional circumstances recognised, it could be exercised only after securing the approval of the family council ; the head of a kinship group could never dispose of land on his own sole responsibility. This procedure also permitted kinsmen and neighbours to exercise their power of redemption and to evict the purchaser by reimbursing him, in order to retain the kinship or communal patrimony unimpaired. All that is now, or will be, at an end for ever. The individual has now the liberty to run his land, to sell his land, to ruin his land. Exchange economy has now entered into native life. The natives have learnt to buy, to borrow, to speculate and to spend. They now demand foreign products from France or other countries, they want money to procure these things ; more than of old they are tempted to be extravagant and reckless.

Though the landowner's liberties are increased, and very greatly increased, they are in another direction greatly *diminished*. In many respects French law is more exacting than the old customary law : especially in the matters of *taxation* and *restriction*.

The *land tax* is established everywhere on the lines "perfected" in the West. The rural tax of former times went under various names : there was the tithe or tenth levied in Islamic

countries on produce and known as the *ashur*, and the *zakat* levied on flocks and herds ; but these were taxes ill-collected, little-collected and often not collected at all ; they were customary taxes which were often evaded. This is no longer the case, at least the authorities try to prevent evasion ; and the French "technique" of collection is coming to be all-powerful. As in France, the land tax in the colonies is now a reality. It is collected strictly and with exactness, as in France ; tax controllers and tax collectors use their abilities to the utmost. The new taxation is a very different business from the old.

In Algeria and Morocco *Arab taxes* are no longer collected ; they have been abrogated and have disappeared, making way for new taxes elaborated according to French procedure which is said to be perfected. The chief one is the *income tax* involving the declaration to the Administration of each individual's gains and profits. More recently the benefit of this tax has graciously been extended—on paper—to the inhabitants of Tunisia, Tong-King, and Annam.

Various regulations, which become more complicated as they accumulate, impose *restrictions* on landowners who have now become "colonists", whether their skin is black or white. The conditions under which agriculture must be carried on are rigorously defined : the landowner is obliged—we must not forget this—to risk capital, to possess animals and instruments ; to clear his ground and cultivate it within a fixed time-limit. Henceforward there is the almost perpetual intervention of the authorities to make sure that the land is being advantageously worked. The authorities have also the power to revoke the concession if the conditions are not fulfilled, or if cultivation is not satisfactory. Landed property is under the *control* of the authorities ; in these two senses it has become an institution of public law. Further, on every plane, restrictions are imposed by the lawyers' edict on the cultivation of the land. Prices for sale and purchase are fixed ; certain crops are obligatory, or limited, or forbidden, in percentages ; quotas are laid down for export to the mother-country or to foreign countries. All these things form a tangled network which limits a man's freedom to cultivate and to trade, and limits it more and more.

Let us note on the three planes—the persons affected, the objects, the methods of French law—the first results of this evolution. There are two major results : a present result and a future result.

The immediate *present* result is that nowadays there are two systems of land tenure at work, owing to the co-existence of "native" customary land law and of French land law. In spite of all that has been done, local law, distinct from French law, continues to persist. Abolition, transformation, innovation have not penetrated into every corner and recess of land law.

In Algeria it is true to say that, with rare exceptions, the new system is applied to all frenchified lands. But between the Algerians themselves in their dispositions and alienations of land, it is the ancient system which survives, somewhat modified and attenuated perhaps. It is only between Frenchmen, or between Frenchmen and Native in mixed contracts or transactions that French law, or a new law, can come into play.

The ultimate *future* result, when the evolution is complete, will be a unified system of land tenure in all its simplicity. This end will be achieved by the natives' own choice, as they learn by degrees to prefer the clearer, better-defined French law; it will then be possible for the French to *impose* the new system on everyone and to establish and guarantee a Land Law (*statut réel*), one single unified system of tenure uninfluenced by the owner's personality. It will then be a matter of indifference whether it is a Frenchman or a Native who is the owner of real estate; the identity of the owner will make no difference to the basic legal principles. This is no idle dream, as you might perhaps imagine. In at least one case just such a Land Law already exists, taking no heed of persons. In Indo-China, notably in Cochin China, a decree of 1925 has set up a Land Code which governs all immovable property without exception, whoever the owner may be, whether a subject or a French citizen (a few trifling rules, however, still apply to native holdings to ease the transition). This marks a step forward towards greater comfort: a unified simplified system, a *territorial* or colonial law in the proper sense of the term, one law for all which satisfies the French mind, and facilitates French action.

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## CONTRACT LAW : OLD SYSTEM

Let us now turn our attention to *Contract Law* and see how a conflict might arise in this connection between rulers and ruled. According to the distinction drawn by Sir Henry Maine between the two aspects of law, the *statute* and the *contract*, the contract is the *obligation*, in the civil sense, of rights created by wish or agreement, not by tradition or legislation. The *statute* is the law imposed by tradition or by regulation : the law laid down, received, endured, but not wished for or desired. The *contract* on the other hand is the law agreed on and accepted, the law devised at will, deliberately created and voluntarily framed.

It used to be thought, as was thought by the author of *Ancient Law*, that amongst "primitive" peoples only statute law existed, that the idea of a contract was unknown to them, and that they were unable to create an obligation by a freely made agreement. Nowadays we know that primitive peoples had a glimmering of contractual law, under which an obligation could be assumed at the expressed wish of those who might be called—as we call them—the interested or contracting parties. Even amongst the most primitive of primitive peoples an agreement based on the wish of both sides has been found to exist. These *contracts*, however, for contracts they are in more than one sense, have peculiar characteristics which greatly differentiate them from our Western contracts, and smack more of the statute.

Three of these distinguishing traits are found here and there, in greater or lesser degree : the primitives' contract is *compulsory*, and it is *common*, and it is *plenary*.

Such contracts are *compulsory*, or quasi-compulsory, since the parties have no option but to enter into them, for they are imposed in varying degrees by tradition and religion. While with us a contract is optional, with primitives inveterate belief and custom compel them to fulfil it within a given time. In the first place, for example, the individual is not free to avoid marriage ; he is compelled to take a wife on reaching puberty : public opinion constrains him, family and tribal influence come into play. If he were to refuse, protest and resist, he would be suspect and he would be penalised. He must marry, that is the statute ; there

is a contract only in so far as he is chosen or chooses between various possible "partis". The heads of families have a certain range of choice, there are consultations, and decisions are arrived at by common agreement. Similarly, in relations with kinsmen and neighbours, you are obliged by tradition and religion to make certain contracts. You enter into a contract even with your gods; you make an offering, and offer a sacrifice from pure self-interest with an eye to some benefit you hope to obtain; you make a kind of bargain with your god, and a recognised formula indicates to him what you want. When an Algerian Berber cuts an animal's throat to offer the best to his god, he says: "This, my Lord, is for you; a thing for a thing, a gift for a gift, a head for a head." I slay this animal for my god in order to get from him greater fertility for my flock. There is a definite, clearly-formulated bargain; a gift demanding a counter-gift; but the exchange is imposed and *must* be performed.

The primitive contract is *common* since the obligation is usually of a collective nature, as regards the agents or contracting parties, and is not, as with us, a personal matter. The agreement is between groups. Even where the contract happens to appear to be an individual matter, and is concluded, as is frequently the case, between family or tribal chiefs, there is not the slightest doubt that the agreement, which is apparently and formally one between the two chiefs, embraces the two groups which they represent. Undoubtedly the kinsmen on both sides are included in the arrangement and bound to fulfil it.

Just as with us, according to the old legal maxim,<sup>1</sup> "a man pledges all he has", among primitives he pledges also the whole group he stands for.<sup>2</sup> All the kinsmen, all the neighbours in a kinship or communal group are bound by their chief's contract once it is made. In sale or purchase, in lease or loan, the kinsmen and neighbours of the named contracting parties are involved and under obligation. The contract is what we might call a plurilateral and not, as with us, a bilateral contract; the obligation undertaken will—far more than with us—bind the descendants and tie the heirs; it is characterised by these two features, by being *plurilateral* and hereditary. The kinship or communal group is, both in the present and in the future, caught

<sup>1</sup> [Professor Maunier kindly informs me that this is a maxim of old French customary law recorded in Antoine Loysel's classic collection *Institutes coutumières* of the 17th century. EOL]

<sup>2</sup> [It is not easily possible to reproduce in English the French play on words "on oblige le sien . . . on oblige les siens." EOL]



up into the agreement reached. So it frequently happened—much more often than in France—much to the surprise of newly-arrived French colonists, that kinsmen and even neighbours had to appear at the signing of the contract and that they had to signify their consent, sometimes by explicit active approval, sometimes tacitly, passively, by omitting to protest. I have seen this procedure myself. The *paterfamilias* may not dispose of the joint patrimony on his own sole responsibility, not even in cases where—and this is by no means always the rule—he is free to administer it alone. When an important transaction is to be negotiated, his kinsmen, his brothers and his sons must be at his side to join their consent to his ; they must make public appearance with him, and indicate their approval at least by their silence and inaction.

Last but not least the contract is *plenary* ; for in its effects, as in the range of persons implicated, it is much more comprehensive and much more effective than a French contract ever is. You might thus express it : that the aim of one of these contracts is not one particular and specific transaction—to sell, borrow, cultivate or manufacture—but is general and undivided ; it binds the parties in every way and for every purpose without limitation ; as in marriage, they owe each other “aid and assistance ” in all circumstances. It is a partnership, an alliance. The one side is bound to come to the assistance of the other as if it were the case of a kinsman or neighbour. The agreement is *universal* and goes far further than it would in the West, for it implies relations of friendship and social intercourse : the two contracting parties establish a sort of intimacy and familiarity between them. The contract is of the same nature as a marriage contract ; as husband and wife owe to each other not one determined, limited, specific and well-defined service, but services and duties of every sort, at all times a *total* and *global* obligation. To express it better, the agreement establishes a society, you might say a community, a fraternity. Master and worker in North Africa have moral duties towards each other deriving from the earlier practice of living together : the simple contract between them partakes somewhat both of kinship and friendship.

These are the *constant* features of overseas contracts. Other features are *variable* according to the persons involved, for the “actors ” or the “parties ” may be *kinsmen* or *friends* or *foreigners*. Hence there are three categories of an agreement affecting both its scope and its value.

The parties may be kinsmen, brothers, and sometimes, though less often, father and sons. There are some agreements which were probably unknown in olden times when the mutual duties between members of a family were comprehensive and admitted of no appeal ; when a kinsman always owed unlimited succour to a kinsman without need for an agreement on the subject. But even in these countries, those days are gone. Kinship is less closely knit, kinsmen have separated. A deliberate formal agreement *may* be made between them to give each other the same succour as in ancient times. They now *promise* to do what in other days they were without argument *obliged* to do : reciprocal and unpaid co-operation is the purpose aimed at in contracts between kinsmen.

Implicit matrimonial contracts have vanished with the disintegration of the coherent conjugal group—the *household* group as we might call it. Now that there is no longer an unquestioned duty of mutual assistance between husband and wife, a duty based on comprehensive and common right, it is necessary for them to recognise their obligations by a freely-made agreement. Thus we now see amongst these people matrimonial contracts frequently entered into to re-establish between the two parties the total, all-embracing bond of fellowship and friendship if not of kinship, which constrains them to render to each other all that mutual assistance, and re-creates between them all those duties, that were formerly axiomatic. In Tunis, Algiers and Rabat the modern Jewish marriage is conceived by the Jews as a contract of partnership on the material plane, the aim of which is the common advantage and enrichment of the partners, the prosperity of the newly-founded household. It is a voluntary contract, willingly concluded, no longer an accepted unquestioned tradition ; the new household is built on a deliberate agreement having the same effect as the inveterate and respected tradition of ancient days : unlimited lifelong mutual aid between husband and wife.

An express contract may now be drawn up between *neighbours* or friends, when the unity of a village group, which in olden times used to be spontaneous and unconscious, has been shattered or shaken. The village feels the need of re-establishing the common interest, and formally agrees to recognise the duty of reciprocal and unpaid mutual succour, making this duty an hereditary obligation on their descendants. Throughout Africa such mutual succour takes two forms : *gifts* and *acts*. Firstly

the agreement, voluntarily concluded by all sides, engages the villagers to grant to each other the free and unpaid use of all such movable objects as any may require—cattle, crops or cash—to enable him to celebrate any festivity which custom demands. Secondly, the deliberate public agreement engages the villagers to work for each other, particularly to help each other in house-building, thus bringing again to life by free or semi-free agreement a neighbourly obligation that had lapsed.

Lastly there is the contract with *foreigners* or strangers. For it is with them, who were bound by no statute obligations, who had no tradition of common duty, who owed no recognised accustomed assistance, who in olden days had in fact been enemies, it was with them that a contract was necessary. To establish a common order and promote the common advantage, obligations had to be expressly and freely undertaken. The contract with foreigners was of two different and opposite types : *feudal subjection* and *commercial co-operation*.

The contract of *feudal subjection* existed in Morocco less than thirty years ago. A poor *fellah*, a penniless peasant without resources, was obliged to seek and obtain the protection of a great landowner. The poor man presented himself in front of the great man's tent or door, slew a sheep and spattered its blood over the tent-peg or the lintel. By this somewhat informal and casual sacrifice, the great man was compelled to accord his protection to the peasant. This Moroccan custom of *ar*, as it was called, represents a type of *forced* contract : the client's prayer sufficed to compel the *qaid* to extend his protection to the petitioner, who thus became a protégé, a subordinate, in a word, a subject who surrendered himself whether of necessity or not, by making a *sacrifice-contract* which was not always voluntary. The mystic virtue of the sacrifice of blood constrained the patron to *accept* and the petitioner to *offer*—if we may use the term—in accordance with a duty imposed by religion and tradition.

The *commercial co-operation* contract is a totally different type of contract, possibly of more recent origin, which is however found even among backward peoples where foreigners are in question. In its earliest form it appears as a *partnership* contract, an agreement to pool the interests of two parties in the hope of profit. Here too it was a plenary contract, a pledge of friendship which imposed duties and assistance of every kind. It seems true that this partnership contract developed out of the kinship custom of preserving a joint patrimony undivided amongst the

heirs. When the *paterfamilias* came to die, his descendants—as we still see to-day in the Maghrib and in the Negro countries—who have the right according to accustomed usage to share out their inheritance, voluntarily agree to keep it undivided. They remain of their own free will in partnership, though they would be free to separate and share out their land, and tradition has given them the right to set up independently by dividing the inheritance. If they prefer not to do so, they remain as an interest group not unlike the “companies” which strangers form amongst themselves. Now, the partnership contracts with foreigners—and this is one of the conflicts which demands regulation—always retain a friendly atmosphere ; they are always plenary contracts implying unlimited mutual assistance, the partners at first shouldering the same duties as the heirs used to undertake. Even to-day the natives find it hard to conceive a “company” in our sense of the word : freely formed, freely maintained, having identity and personality, and possessing rights of litigation (*étant “sujet de droit”*), thus being able to act as might a family or tribe ; being in fact a collective entity with powers to possess, to sell, to sue in the Courts. Even the Muslims, advanced though they are, still find it difficult to admit that a trading or commercial company can be a “person” endowed with powers. The orthodox commentators, remaining True Believers, people of the Strait Gate, refuse to recognise the company as having a legal personality and as being committed by its manager. At the very most, the innovators admit that there may be a tacit mandate between the partners which they call *ukala* ; this would indirectly prove a substitute for that unity and identity of the company which the great commentators have not recognised.

On all these planes and in all its features, the native contract as understood in the French colonial territories has down to the present day remained a *customary* and at the same time a *religious* contract. It is therefore a solemn, ritual affair ; regulated as it is by inveterate tradition and by a mystical respect. It does not, as amongst us, rest with the “parties” to the contract freely to decide the clauses and details of their agreement. Not only are they frequently compelled to enter into it, but they cannot, even if they would, refuse to conclude it. On the other hand, its conditions are laid down by religion and tradition, they are “stereotyped clauses” (*clauses de style*), as we might say, imposed by ancient usage. Not only amongst backward peoples, but

even amongst advanced folk like the Musulmans, the contract is in its formulas an act of worship. You must recite a verse of the Quran, the opening verse known as the *fatihah* : " In the name of Allah, the Merciful, the Compassionate . . ." If this verse is not recited by the parties at the moment when they reach agreement, the contract is void ; and it is the duty of the religious judge, the Muslim *qadhi*, to cancel it.

Inconvenient as all this is to those seeking freely to develop the country, it does not mean that many of these contracts fail to prove adaptable for this purpose. Thus among Muslims there are the *pastoral* contract, the *agricultural* contract and the *commercial* contract.

The *pastoral* contract is a lease of live stock, a partnership for the rearing of cattle with division of their increase between the herdsman and the owner. Strictly speaking, this type of contract is forbidden to Muslims ; the orthodox commentators hold that it is a breach of the Prophet's injunction : not to speculate on uncertain profits.

The *agricultural* contract is a lease, technically known as *complant*, under which two partners, each supplying capital and labour, plant crops and later share the produce. Such is the *mugharsa* of North Africa which the colonists of Algeria, Tunis and Libya were able to use, entering into partnership with the natives according to their customary law. Thus the way for the European development of the land was paved by the contractual practice of the original inhabitants, and a link was forged between native and newcomer.

In this the *commercial* contract also played its part. The profit-making company, especially the sleeping partnership (*la commandite*), had long existed amongst the Musulmans. It always retained its curious character of a total, plenary commitment in virtue of which each owes unlimited succour to his partners ; there was thus an unlimited liability between the co-partners. This type of company existed, barely tolerated and not approved of by the commentators. It was always illicit, at least in early times, primarily because a True Believer might by mistake allow his interests to be involved with those of an Infidel, a Jew or a Christian. Unknown to the Believer, the Unbeliever might use the partnership against the True Religion : he might sell wine or a pig ; these were the examples quoted by the commentators. " A society is a danger even on the road to Mecca " the saying ran ; namely, even between pilgrims

performing the Haj who by definition are most assuredly True Believers all ! Yet the society or company has long been widely spread in these countries, as also amongst backward peoples like the Negroes : there are societies of fishermen and hunters who share their catch on a system regulated by agreement and tradition. All these profit-making groups smoothed the path towards a partnership in regard to goods and profits, often a very intimate partnership, between " ruler " and " subject ".

## CHAPTER LXIII

### CONTRACT LAW : NEW SPIRIT

Such has been the past history of Contract Law in the French colonies. What of the present? Above all, what changes have had to be made in the old system to adapt it to the requirements of "progress"—abrogating, reforming, innovating, as always.

The first essential was to change the *spirit* of the system, so as to produce a law of contracts which should not be, as of old, a solemn ritual business, but which should have three completely new features : it must be a *secular* law, a *private* law and a *real* law.

Regulations have to be devised which can apply to all, in order to serve the needs and uses of development ; they must therefore be disentangled from the meshes of religion and tradition. There must be a *secular* law. To avoid difficulties and complications in controlling people's interests, to make negotiations between interested parties easier and easier, formality and ceremonial solemnity must be banished. There must be a *private* law. Lastly, the law regulating agreements must be a law *ad hoc*, a *real* law governing the specific and particular effects of the agreement only, and not involving the personalities of the parties to the contract with all their interests and attributes. The *real* law must put an end to the plenary contract, aiming at partnership and friendship, involving the whole person with all his resources, and creating undefined and unlimited duties. This is incompatible with security which is always allied to simplicity.

We shall therefore not be surprised to find that the three procedures which we are familiar with for adapting ancient ways to modern needs, are once more brought into play.

The French *abolished* and put an end, sometimes completely, sometimes partially, to the old contracts, and this from two major motives which always underlay their interventions : *morality* and *security*.

Morality entered in, when agreements concluded under the old customary law seemed to shock their conception of the liberty and the dignity of their "subjects".

Thus in French Canada the *poilatch* feast was forbidden, an agreement or pseudo-agreement by which a man was sometimes

compelled to dispose of all his possessions, dissipate his entire wealth, in order to win or preserve the religious authority lent by the resulting prestige. In an ecstatic outburst of pride he had to ruin himself and his dependents. Amongst the Red Indians of Canada and the aborigines of Australia and New Zealand, you became a Chief by destroying or distributing everything you possessed so as to display your generosity, which is in primitive eyes the supreme virtue. To our thinking the "communism" of such generosity is simply an abuse, and an immoral abuse. In the same way, the French forbade the *pledging of the person* as security and guarantee for a loan in various countries, in Tong-King, in Annam and throughout Negro Africa. This pledging of the person reduced the insolvent or recalcitrant debtor to the position of a labour slave. This was in French eyes an affront to human liberty and dignity. This form of slavery for debt has been abolished in the colonial empires ; and their example has been followed by the independent states. Amongst the more backward peoples this personal pledge was also a *collective* one ; not only the debtor himself, but his kinsmen, any persons related to him by blood, could be enslaved also. This was so amongst the Fanti of the Gold Coast, where the family group could be compelled to perform forced labour for the creditor's benefit, the whole group being held responsible for the debts of its members, even if these were contracted without its knowledge !

Both from *security* and utilitarian considerations, the French abolished many of the pre-existing contracts which they found in force among the natives when they occupied a country. This was done in order to protect the colonists in their work of development against the effects of native contract law. Up to the present they have not been cancelled everywhere, but at least in those settlement areas where the colonists were numerous and where they were most likely to be hampered, sometimes ruined, by the provisions of the old customary law. In Algeria, in Indo-China and Madagascar, as well as in French West Africa, the Administration ruled that all "mixed agreements" between White men and Natives, all contracts made between Natives and Frenchmen, should be governed by French law to the exclusion of the ancient law. A *mixed system* was created ; but it is mistakenly so called, for the mixed system is the French system. The French law of contracts, as laid down in the French Civil Code, is uncompromisingly to govern all contractual relations between



Natives and French. From the very beginning in Algeria under military rule the orders of 1834 and 1842 had fixed on this solution. It was confirmed by two laws of 1851 and 1873 which cancelled *en bloc* the old customary contract law whenever agreements between French and Algerians were in question.

In all these cases abolition has been *general* and comprehensive. In various other cases it is partial only, the old system being limited in one of two ways: by *compulsory* limitation, or by *voluntary* limitation.

A couple of centuries ago colonial legislators had introduced *compulsory* limitation of contracts by a new statute. In the 18th century in New Spain—the Mexico of to-day—all contracts and debts of the natives were annulled if they exceeded 5 piastres or 25 francs in value. Except in cases of microscopically small contracts—such as in Roman law were of no account to the lender—in the case of every contract of any size or range which could cause serious harm to the contracting parties the Mexican law was abolished, and Spanish law came into force. In the French colonies *voluntary* limitation is a consequence of the option accorded to the natives to bring their *own* contracts within the range of French law if they so wish. This “right of option” I have already touched on above.<sup>1</sup> It is enough for the parties expressly to declare in the contract, privately, without solemnity or publicity, by just mentioning the fact, that they understand that this contract is governed by French law, and this *submission clause* freely and voluntarily abolishes the old-established custom and substitutes French law *between natives*. This right of option is not always unlimited. It is so in Algeria and Morocco, in French West and French Equatorial Africa; but not so in the Empire of Annam. There the Sovereign’s consent is necessary; if one of his subjects wishes to exercise an option and place his contract under the jurisdiction of French law, he must first secure an authorisation from the Emperor. Apart from this case, however, the French Courts have recognised that a *tacit* option, formally unexpressed, is sufficient to frenchify a contract. By the law of 1889 it suffices in Algeria—excluding Kabylia—that a contract be executed before a notary, and be seen by a public official, to establish the presumption that the parties to the contract have opted for the Civil Code!

More usually the French have acted by *reforming* the old system, not wishing radically to abolish it. They have confined

<sup>1</sup> p. 563 f.

themselves to meeting new requirements by a skilful retouching—where this was at all possible—which would give the colonists the necessary security for their work. A transformation has been effected in the colonies, especially the French colonies, in two ways or on two planes : in the *form* and in the *substance* of contracts.

The greatest change is in the *form*. An absolutely radical change has been made, the result of which is no less than a revolution in the original native contract system. In olden times, even in Muslim countries, agreements had three distinctive features : they were *oral*, they were *ritual*, they were *public*.

It was usually enough for certain words to be pronounced in front of witnesses in order to seal the contract. Traditional law, as cannot too often be repeated, was an oral law and agreements were therefore verbally concluded ; they were sanctified by magic, mystic words which by some secret potency bound those who uttered them. The words had to be confirmed by witnesses ; this was in fact the proof by witnesses which was recognised even in *Muslim law*.

It follows as a direct corollary that these were also *ritual* contracts. For the words used were fixed by religion ; they were no casual words that had to be pronounced. Let us not deceive ourselves as people, and especially French officials in the colonies, so frequently have done. There was no question of these mystic words *confirming* a harmony of wills ; these were stereotyped formulas which evoked the presence of the gods. In North Africa no contract amongst the traditionally-minded Muslims, the " Old Turbans ", is valid, unless the *fatiha*, the opening verse of the sacred Quran, is recited, to call on Allah and make him a party to the contract.

These contracts are solemn public acts performed *in facie ecclesie* or *coram publico* ; they could be performed only in the presence of an assembly gathered together *ad hoc*, sometimes an assembly of the entire tribe which solemnly conferred publicity on them. The contract was a truly public one—witnessed by the neighbours, the community or the tribe—and solemnity was an essential feature of it.

The change which revealed to the natives the French method of making agreements was utterly radical. They always were quick to take a liking, often a very sudden liking, to what in the Near East they called a *farangi* contract : the *written, private, secular* contract.

The new type of contract was a *written* one, for though in French law the writing does not *make* the contract and is not a constituent element of the contract, yet it is necessarily the *proof* of the contract. The written record is the sure and certain proof, and is worth far more than all the witnesses, were they as numerous as they always are amongst the Maghribins. Often a hundred witnesses have to be called to testify that such and such a contract was duly made—a hundred witnesses who—as we well know—are not worth one tiny written document.

The new type of contract is *private*. Though contracts are frequently made public to protect the contracting parties or some third party, publicity and solemnity are no constituent elements necessary to consummate the agreement; the contract is a harmony of wills which is perfected by a simple exchange of consent prudently attested in writing.

The new type of contract is *secular*, since it is governed by civil and not canon law, and since the gods have nothing to do with its conclusion.

Is this to imply that these new contracts under civil law are always simple and that it is always easy to complete them? Far from it. For abuses have appeared which had not been foreseen. The simplified contract bristles with dangers. It has permitted the creditor, who is often a usurer, to exploit the value with which mystic and magic tradition endowed the written record and to fleece the improvident and thrifless debtor. It has strengthened usury in Muslim countries. For the last twenty years the French have been vigorously fighting this plague. Since 1920 deeds of loan have had to be approved by the authorities in Senegal and the Sudan. The written document, which is private, and which according to French law suffices to establish the contract, must be signed in the presence of an authority who intervenes to ensure that it is correct, and especially to ensure that the legal rate of interest has not been exceeded in the lender's favour. There must be *verification* and *registration* by the authority. This involves the intervention of the French Administrator, in whose presence the contracts must be publicly signed. This introduces a new formalism, but a formalism far removed from the old type. It is no matter of ritual; it is simply as a precaution, a guarantee that authority steps in, to look into and supervise the agreement in the common interest of the contracting parties.

The French have also reformed or "regulated" the *substance*

or the effect of the contract law between natives. Where French and Native are involved, it is French law which rules to-day. But between the native inhabitants it is another law modified by the French. In Algeria and in Tunisia they have "regulated" this curious lease for joint farming—the *complant* as it is called in French, the *mugharsa* as the natives term it—by means of which olive groves have been planted in the Tunisian *sudd*, and they have thus adapted it to modern requirements. Even in Libya, where the *mugharsa* is frequently in use, various features of this contract have been changed; it has been edited, codified and precisely defined. This type of contract, which used to be governed by tradition, which was uncertain, indecisive and obscure, has been rendered precise and definite, to the common advantage of the contracting parties. This is one of the results of French intervention: to introduce clarity and precision, to impress on the law the spirit of Descartes which the French carry with them everywhere, since it is their own spirit that impels them to *define* in order to *guarantee*.

In the matter of contracts they have freely *innovated* since it is a question of "real law" (*statut réel*). On this plane a whole great extension of the French Civil Code in the colonies was completed and a whole expansion of laws *sui generis* was carried out to regulate particular points—laws, decrees and law-decrees. This innovation was also a revolution and it was marked, as might be expected by *new contracts* which were a revelation to the native inhabitants of the colonies, and were unprecedented amongst the peoples whom France was governing.

When we speak of *sale* we fittingly understand the word in the European sense. Where the natives were backward they were familiar with sales, but in their own sense of the term. The sale of landed property was unknown or prevented. The *pater-familias* had almost never the power freely and without restriction to dispose of the jointly-owned land; houses and fields were traditionally "inalienable". If stark necessity drove the group to sell, the approval of the principal members was essential; this approval might be signified by their silence on the principle: "he who says naught, consents." Even in such a case the sale of land was not for ever, and it could at any time be revoked. In old Hebrew law, sales and loans were terminated at the end of seven years, or at the end of fifty, namely, seven times seven. In Islamic countries and amongst the Negroes opinion held that the sale of land was provisional or revocable. The kinsmen of

the vendor believed themselves to have the right, whenever they could afford it, to evict the purchaser and resume possession of the land. In Algeria an old custom still prevails—though the interpreters of Muslim law would fain ignore it—according to which the sale of livestock and of products remains revocable as long as both parties are still present in the market-place. Throughout the whole day that the market lasts, the vendor has the right to repent of his bargain provided the buyer is still present. Thus a native sale is in more than one respect a precarious affair, an unstable contract, on which the seller is entitled to go back if he changes his mind within a short time. The idea of being bound, with no possibility of retreat, by the momentary decision of two people, is foreign to the primitive mind.

An Englishman travelling in Gambia as early as 1732 has recorded that the Negroes would sell an object in the market in the morning, but felt entitled to break their bargain up to the time of sunset. There does not seem to have been in this case any influence of Muslim law, but merely a coincidental convergence based on the idea that no one ought if he could help it to sell his goods except under pressing necessity. Out of this a difference arose which the traveller recounts with some humour. The English governor bought a cow and paid for it forthwith. To mark it as his property he cut its tail. The vendor pretended that he wanted the cow back to pay his daughter's "dowry". He claimed the cow back, but refused to accept it without its tail. The Governor, finding "the people against him", had to pay a large indemnity for having cut the tail of a cow which did not belong to him, because the original owner was entitled to ask for its return. This was the comic side of a native sale . . . There is a tragic side too. Unfortunate colonists have been expropriated from land which they had bought with their hard-won money because native custom allowed the seller or his kinsmen to redeem it. There had been a misunderstanding! Sale, as understood in the French sense, is to the native a new type of contract, for the goods change hands finally and instantaneously when once he has said *yes*.

Other contracts introduced by the French were entirely novel: payment by *cheque* or *money order*, for instance, was often quite unknown to customary law. The Sudanese and the Muslims knew about it, but it was unheard of in Indo-China. It remained for a judgment of the Saigon Court of Appeal to decide in 1926 that the subjects of the Emperor of Annam should

in future have the right to offer cheques or money orders according to French codes and laws, though this type of contract was new to them.

The *loan at interest* was another new type of contract in the French colonies, where according to tradition interest was not recognised. Throughout Islam interest on capital is held to be usury, inasmuch as it implies a speculation about the future, an estimate of the uncertain, a preview of the designs of God ; it was therefore forbidden by the Prophet. What the Muslim calls *riba* is condemned as an anticipation of *what is written*. The fact that nowadays many a Musulman runs an account in a bank at small interest, and that the Misr Bank—the National or Patriot Bank of Egypt—founded by True Believers, lends at interest and not gratis, proves only that the breath of the new spirit blows strongly in defiance of Al Azhar. It was necessary for a commentator and reformer of a “modernist” way of thinking to issue a *fatwa*, or authoritative religious judgment, to interpret the Tradition, proving by undoubtedly subtle arguments that it was legitimate to receive in re-payment of a loan more than had been lent. It is very certain that this decision would never have been reached if no European had passed that way. The appearance of loans at interest in the contract law of colonial natives is a new phenomenon deserving of fuller treatment.

The habit of *insurance* is spreading amongst the Negroes and even amongst the Arabs too. Insurance is also a thing forbidden to Muslims by their religious Tradition, for in itself and in its aims it is a speculation on the uncertain, and even to-day all the True Believers are against it. This superstitious reluctance to insure is common also in Italy and in Provence. Women especially, who are the guardians of tradition, are peculiarly reluctant to adopt insurance, particularly “life insurance”, fearing to bring down Evil on themselves. This greatly hinders the spread of this beneficent form of contract.

The *wage-system* is yet another type of contract that was unknown to the overseas peoples. The status of wage-earner, a man who “draws” an income, a pure income, from an employer on whom he is dependent, the status of a working man possessing no land of his own, is a phenomenon of yesterday in the colonies. It originates in the very marked decline of the village group. As long as kinsmen and neighbours were traditionally bound to come to the rescue of anyone in need, there was no necessity for

paid work. The French felt compelled to break up the solidarity of these communities who made it their duty to maintain the poor and needy; they felt this essential in order that these unfortunates, being no longer aided, should come to "earn a living" in the European way, by accepting a wage and exchanging for money their power of work. First in French India, and then in all the French colonies, "work contracts" made their appearance, especially in towns and plantations. These contracts are governed by the laws and decrees of the ruling States since they are unknown to the customary law of the peoples. They fulfil—more or less successfully—the mutual-aid system of the vanished past, now that kinsmen and neighbours are no longer able to play their former part and guarantee security to their fellows! It has therefore been necessary to issue regulations in the colonies to "protect" the working man, and in these countries, as in France, increasingly to lay down the conditions of working hours, wages, holiday-periods, holidays with pay, etc.—all of these things being revolutionary innovations.

All this is but one aspect—how unexpected, how unhelped for—of a profound change in native life brought about by the French and due to the entry of the native into world commerce. In olden days the various communities were almost entirely self-centred and self-sufficient: each unit of the population concentrated on its own ever-limited interests, turned its eyes inwards, and paid no heed to the outside world. To-day they are buyers and sellers, "exchangers" in the world markets, in relations of sale and purchase with the entire universe. A new spirit is inspiring and animating them; a new medium has come to aid—or—if we are to believe Gandhi—to pervert them. For this new medium is money, which came with sale and loan: in a word with the price of labour and of products. The lure of money has crept in amongst the natives. Perhaps I was guilty of a crime—for which I shall one day have to answer to my Maker—when seven years ago the Moi tribe was for the first time making its submission to the French Resident, laying down its arms and receiving from him the salt of absolution, and I slipped two bank notes into their hands, explaining to these primitive folk what the notes were for . . . no easy task. To turn their eyes outwards, to open up exchange relations with the whole outside world, to start a profit and loss account with the universe; to expose themselves to the upheavals and revolutions which shake the globe: such is the "message" which has been revealed to the

simple-minded natives, for their greater prosperity—if not always for their greater happiness !

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## CHAPTER LXIV

### PENAL LAW : OLD PENALTIES

The *Penal Law*, the corpus of penalties, is the one where the conflict of ideas and of taste—and of distaste—most definitely strikes many Western minds. The native penal law of the colonies such as it was in the Past—often the very recent Past of yesterday—must be considered under two heads : *infractions* and *punishments*.

As we should expect, the *infractions* were not specified in precise terms in written texts. In this sphere also, we are dealing with a customary *oral* law, over and above which was the *royal* law elaborated by kings or chiefs, an absolute, but also an undefined law. Travellers usually saw this only as capricious and arbitrary, and described it only as such, but underlying it there was a more obscure because more ancient law, the law of kinship and neighbourhood, not formulated in edicts, but respected none the less. These ill-defined infractions on both levels might always take three forms : *material* acts, *collective* acts, *religious* acts.

As regards *material* acts. The family, tribal or communal group is always the judge of infractions ; it is enough if in their opinion some act or deed has been committed, there is no need to seek a motive for the deed. They pay no heed to the question of whether the act was intended—the outcome of a sudden impulse or of a long-premeditated, calculated design—or whether it was simply an act of imprudence, or complete ignorance, or pure inadvertence. To be the “author” of a deed, though by accident or inattention, through carelessness or thoughtlessness, is in their opinion to be guilty, and just as guilty as if the deed were done with deliberate intent ! Amongst the Serer of Senegal it is still the case that homicide is proved simply by the fact that the blows delivered have caused a man’s death. What we might call “assault and battery” or “man-slaughter” may be an offence of hasty temper only, even if its results exceed the normal direct effect the offender was able to foresee. Amongst these peoples, however, the material act and its result, whether intended or not, constitutes murder.

Amongst backward peoples whole groups are held *collectively*

guilty, as the authors of infractions punished, even though in fact such infractions may have been the distinct and separate work of one individual whom it has been possible to "locate". The whole community—of kinsmen or neighbours as the case may be—is held "responsible". This is because the individual is not yet clearly detached and dissociated from the society of which he is a member. Our clear European conception of personal crime scarcely exists amongst primitives: their sins and offences are common acts both *in fact* and *in law*.

Very frequently, much more frequently than in France, it is the case that offences are *in fact* really communal concerted offences committed by groups, especially family groups which are a close body of kinsmen. Such are the gangs which conduct a *ghazu* in search of booty or in pursuit of vengeance, acting against other gangs and committing collective crime.

These acts are considered as collective *in law* also, for even though such and such an offence is recognised as the work of so and so, public opinion is against singling out the individual offender and prefers to exact reparations from his kinsmen or neighbours in company with him. It is the reign of "They" and "We", not of "He".

We next come to *religious* acts—or rather anti-religious acts—for an offence however undefined, is essentially and fundamentally, or is at least felt by public opinion to be, an affront to the power and pride of the gods. It is against the gods, and it moves the gods. A spasm of fear therefore inspires the reaction of the group whose anger is passionately unloosed against the offender, since feared and venerated spirits are offended by the infraction. We cannot account for the reaction of the social group by seeking to ascertain what injury it suffers by the infraction! It is not a question of harm done: it is emotion, and fear, horror and terror!

Thus, when a murder is committed: the domestic murder within the tribe provokes an outburst of indignation. There is something moving about any death at any time, but doubly so if you hold the strange belief common to these peoples which J. G. Frazer and Lévy-Bruhl have expounded. In primitive eyes death is never "natural", never spontaneous; it is always brought about by some magic deed, the work of some malevolent sorcerer; murder is the mystic slaying of another, by some action which sets in motion infernal demons, subterranean spirits, artificers of death. In backward countries murder is therefore one

of the most frequent crimes. For every—or almost every—death is held to be the work of some evil jinn, provoked, instigated or set in motion so to speak by some individual who can be sought out and found, and on whom then descends the fanatic hate of the whole group. The man who has slain the deceased, or has brought about his death by the aid of a demon, must in his turn be slain. Death demands death, for the compensation and appeasement of the native gods. This belief, that when any death occurs there must be a criminal behind it who is answerable and who should pay the penalty, is responsible for a vast sacrifice of human life. The progressive depopulation, which the French noted on their arrival amongst backward peoples in their colonies, was to a large extent accounted for by this one factor : the native practice of punishing by death, and death multiplied and extended *ad infinitum*, supposed murderers to whom the *lex talionis* was ruthlessly applied. Not only the supposed murderer-by-magic was slain, but his kinsmen too, who were answerable for him, and hence counted legally his “accomplices”.

An infraction of the customary law is not only in itself an anti-social act, it is an offence against the gods provoking the wrath of the outraged deities. In Malaya and Melanesia, amongst the Indonesians, murder is frequently found to culminate in suicide. A man is seized with frenzy, he dashes abruptly out of his house armed with a *kris*, he rushes through streets and alleys savagely slaying everyone he meets ; his delirium grows wilder and in the end with a gesture of fury he slays himself. This is the phenomenon of the man who “runs *amok*”, murdering himself after having murdered others under the same inspiration and excitement. The madman imagines himself led by evil spirits : he obeys like one possessed ; he is their tool only and their toy ; slayer and slain : a plaything quickly smashed !

Such are the infractions. What are the *punishments* laid down by traditional law ? As we should expect, they are of three types : *passionate*, *collective* and *religious* penalties.

When the social group believes its gods to have been assailed, its *passionate* reaction is a sudden outburst of savage execration. The penalty—so far as the word is here applicable—is the sudden display of indignation by the whole community, the unanimous outburst of wrath-laden hate, as soon as the offence against the gods is realised. There is nothing rational, nothing planned,

in this reaction. Emotion immediately bursts forth uncontrolled, vastly overshooting its mark ; and, being an emotional phenomenon, achieves the maximum possible effect, to appease the gods and to restore peace.

Things happen thus more particularly when a death occurs within the tribe. The collective wrath leaps unhesitatingly to accept the fact that a crime has magically been committed. In such social conditions do not let us talk of "criminal procedure"! It is enough that the whole community is unanimously convinced that a sorcerer has by his magic caused the death ; at once an explosion of fury is let loose which simultaneously and immediately both *proves* and *punishes*. In our own day an English traveller saw this happen in New Guinea. Someone had died. A man was accused of having caused the death ; his neighbours raised a hue and cry and he was carried off . . . The Council of Elders, stirred up by the maddened crowd, strove to intervene, but was almost at once stampeded. The Elders felt they should hold a trial ; according to tradition it was the business of the old men to pass judgment and assign the penalty. But the Elders were rushed ; without even a breathing space to summon the accused to appear, they sentenced him to death. The "guilty" man was taken aside and slain within a few moments.

The striking point about such a story is that the punishment was *collective*. It was a social group, in whole or in part, which set the movement going. The family group, or the village group, as the case may be, seeks vengeance on, or the punishment of, its victim when one of its members has been struck down. The solidarity of the group is *active* : pursuit and punishment are usually carried out by the community as a body.

On the other hand, the punishment is collective in the *passive* sense also. Even where it is obvious that the act was committed by one individual, his kinsmen and neighbours must suffer for it as much as he. As many of them as can be found must be made to answer for it, for the people's reaction is purely emotional ; the whole human group must be appeased by unleashing the anger of their gods against the other human group. Amongst the native inhabitants of colonial territories, including even the most advanced, we normally find—almost without exception—that the responsibility is collective, whether within or without the social group. If it lies within, the Council of Elders, being first bestirred and then submerged by the hostile crowd, will

strike the kinsmen without attempting to single out the individual author of the offending deed, even if he is very definitely known. If it is without the group, the entire kinship of the deceased will set out in a body, to find the relatives of the offender. All his kinsfolk, all at least "who eat of the same bread and from the same pot", will be pursued and hunted down. In the earliest days all might be slain; later the same evolution took place as in Europe, they might obtain pardon by paying a ransom or indemnity which was however, levied, from the whole group collectively. Later still, customary law set up a tribunal, or rather a pseudo-tribunal, a Council of Elders, a bench in tatters such as I have seen; but even in this case it was always the collective act that counted. When the passion of the social body has been appeased, when the recognised "procedures" have been gone through, and the mob has ceased its clamour; even then the proof is not established by witnesses who have heard and seen—not a bit of it!—but by co-jurors, the kinsmen of the prosecutors or of the prosecuted. These co-jurors are many in number—in Morocco and in the Atlas Mountains the number may run up to a hundred. They are not witnesses; they are there simply to swear that in olden days they used to deal as a body with a criminal offence. They are nothing more than the escort, or the "muster", of the kinsmen, recalling a time when the penalty was a communal one, when the kinsmen paid for the kinsman, and the neighbours for the neighbour. Even to-day, amongst the peasants of Senegal and the Sudan, the village as a whole is held responsible for minor offences. Amongst the Toucouleurs<sup>1</sup>—as we know from a collection of local customs made by a native in 1907 but only recently published—it was a common thing for a whole village to answer for the misdeeds of one in such cases as assault, theft, wilful damage, and similar trifling offences against "property". It was the same in Annam and Tong-King between one communal group and another: in similar cases penalties were collectively exacted.

Under customary law pains and penalties are *religious*; behind them looms always the appeal to the gods. For it is the gods, authors and guardians of tribal order, who are offended. Their worshippers believe that the gods will manifest their wrath by some direct act and if, as often happens, they do not immediately do so, the native diviner is quick to interpret some acci-

<sup>1</sup> [A hybrid race in Senegal. EQL]

dental misfortune as their doing. Dreading this danger, the worshippers dare lose no time ; to appease the angry gods they pursue and punish in their name. The criminal slain in some places by a collective act—as amongst the Hebrews by stoning—slain in other places by an executioner, sometimes publicly, sometimes in secret, is *sacrificed* to give peace to the gods. The Romans used to say to a man condemned to death : *sacer esto*, you are a sacred offering promised to the Spirits. The death penalty is a sacrifice offered to the gods to satisfy and to appease them.

It is therefore entirely mistaken to attribute *private* punishments to backward peoples. Some have said that in the oldest societies the punishment of criminals was purely the vengeance taken by one individual on another. From this public punishment was supposed to have been evolved—no one knows how—as a common act of the community, and finally a penalty decreed by the State. The development would then have been, as Littré held,<sup>1</sup> from *indemnity* to *penal system*. It was not so. The punishments which are practised amongst primitive peoples, whether internally or externally, are a matter of public law : they are genuine public penalties.

As regards *internal* punishments : when a crime is committed within a group, a family, a village or even a tribe, public punishment will follow. The indignation of the whole body is communally displayed, either by the action of the mob or by the action of the authority. Either way, the punishment is authoritative, for authority may be distributed throughout the mob and identified with the group in its entirety, or else it may be delegated by the group and exercised by a separate and defined representative, a Council or a Chief. The Chief *must* punish, he has no choice but to punish, not capriciously and arbitrarily, as has been suggested, but in accordance with the traditions. Save in cases of tyrannical dictatorship like Dahomey, the Chief is merely the agent of customary law ; and the punishments which he imposes are *laid down* by the system.

As regards *external* punishments dealing with offences of one group against another, a murder between two families or two tribes : in such cases the *vendetta* or blood-feud comes into play, But this is not the blood-feud as our old commentators used to imagine it, a personal private act, which a person was free to

<sup>1</sup> *Origine de l'idée de justice* (1871), reproduced in *La science au point de vue philos.*, 1884, Chap. XI.

carry out or not. The vendetta has two characteristics : it is *communal* and it is *obligatory*.

It is just as much a *communal* matter as punishment within the group : kinsmen and neighbours are both actively and passively involved as pursuers and pursued. It is *obligatory* since the gods have been offended and action must be taken in their name. The spirits *must* be appeased ; the kinsmen of the murdered man must be cleansed of impurity : only the performance of the vendetta can wipe out the stain of impurity which their kinsman's death has caused them. From the *Odyssey*, Book X, line 130,<sup>1</sup> we learn that in Homer's day the kinsman of a murdered man might not lay aside his mourning until due vengeance had been wreaked and due punishment inflicted. Vengeance—was a *duty* imposed by the gods. In Malay and Malayo-Polynesian countries there is a great, extremely murderous institution, known as Head Hunting, the spirit of which is the same. Amongst the Dayak of Borneo the purpose of head hunting is to avenge yourself as much as possible on the kinsmen of an aggressor. The heads brought back are blood-feud trophies which perpetuate the hostility between tribes, as a result of which entire villages are sometimes depopulated. Even after a public authority, a Council or a Chief, has been set up to supervise the punishment of inter-tribal offences, there will still remain the vivid memory of the duty-feud. If only the relatives would consent to accept an indemnity or blood-price and thus put an end to the vendetta, "public action" would no longer be possible. Before the Italian conquest of Abyssinia there was a remarkable transition stage between the two systems. There was a tribunal which pronounced the death sentence in the name of the sovereign, but this authority delegated to the aggrieved kinsmen the duty of carrying out the sentence and handed them the gun so that they might slay the condemned man with their own hands !

The vendetta, a common duty, a public act, a compulsory murder, executed by kinsman on kinsman may therefore be called a penal *law*.

<sup>1</sup> [There must be some printer's error here. I can find no such suggestion in Book X—nor indeed anywhere in the *Odyssey*. EOL]

## PENAL LAW: PRESENT PENALTIES

From many details we can at once observe what measures the rulers of colonial countries have been obliged to take in regard to penal law. In view of the collective nature of the existing penalties it frequently occurs, for instance, that *hostages* are seized and punished in place of the actual offenders. The *ordeal* in particular, "the judgment of God", is at once a punishment and a kind of "proof"; a means of *detection*, a procedure for discovering the offender by an appeal addressed to the divine beings; a method of *punishment* also, since the criminal is both *discovered* and *smitten* at the same time. In Negro countries the ordeal is poison; the supposed criminal either survives, or fails to survive, the draught of "red water". This poison ordeal is one of the causes of depopulation in the Black Continent. Other ordeals are in our eyes no less shocking: the ordeal of glowing coals in India, where the victim has either to eat or to walk over burning coals. If he is more or less seriously burnt that proves that he is guilty and he is instantly punished. Then there is the alligator ordeal of the Negritos, especially the Nigerians. The suspected person is thrown into the river and if a crocodile seizes him the blow of the saurian's teeth is proof and punishment in one!

Some of the penalties too, which are punishments only, without aspiring to be proofs, seem at first sight to call for the interference of the authorities. The "popular" collective act of *stoning* is the work of the suddenly excited mob who pelts the guilty person with stones. In various places this is the accepted fate of the adulteress. Not only amongst the Negroes, but amongst the Muslim Arabs too and even in the Egypt of yesterday, the unfaithful wife was cast out of the harem to be stoned by the populace, ever ready to take an accusation as a proof of guilt! In certain places *torture* too was still applied to the errant wife; in the French Slave Coast she was boiled alive; in Bornu<sup>1</sup> she is flogged to death. *Mutilation* has not yet disappeared and is sometimes of refined cruelty. In Thailand (Siam) there were still some remote corners where not fifty years ago an *adulterous*

<sup>1</sup> [An ancient kingdom in the N.E. of Nigeria, S.W. of Lake Chad. EOL]



woman was, so an author tells us, "abandoned to an accustomed stallion—for infamous purposes", other less . . . far-fetched . . . cruelties are even more widespread. For other offences amongst backward peoples the *extraction* of one or several teeth was practised; amongst the Australian aborigines the *dislocation* of a big toe by means of a red-hot stone; *branding* was frequent also, not only as a punishment but also as an amusing entertainment; so it was too amongst the Abyssinians.

With our ideas of law and order, we believe that a modicum of humanity should be guaranteed to the accused and to the condemned; we must take some action in these matters, and the French have done so, even to the point of causing a revolution in penal law. We must analyse the *agencies* and the methods by which this revolution was brought about.

The *agents* or actors in this change were primarily two: the *individual* and the *authority*.

At the very beginning of relations, before any power in the western sense had been able to gain a footing in overseas countries, the *individual* European, explorer, conqueror or adventurer, sometimes stepped in, as we learn from travellers' tales and often from novels. The traveller Phileas Fogg nearly lost his wager by snatching from the pyre a Hindu widow who was going to be burnt. Similar acts are in reality fairly common. Some fifty years ago in Central Africa a most impulsive Scot—how rare the species is!—saved the life of an accused man by throwing away the poison he was about to drink as an ordeal. The rescued man was bitterly and justly resentful, for his European saviour had prevented his proving his innocence according to the respected custom; he was a chief, his people now suspected him; he was a ruined man. It is not easy to make people happy!

French *authority* acts more tactfully in order to approximate penal law to French ideas of law and order. Occasionally in certain countries the reigning sovereign, under European influence, without waiting to be forced, spontaneously decrees the abolition or the reformation of the penal system. This not infrequently occurred in Islamic countries. Thus in the Ottoman Empire the penal *shariyah* was abolished or reformed as early as 1858. In Egypt also, in 1855 and 1883, and still more by the penal Codes of 1904 and 1909, the penal system was overhauled with the express reservation of the "blood price"

which was consecrated as a religious duty by the Quran and by the Sunna ; this is known as the *diyyah*, and this the new codes were bound to respect. In Tunisia a decree of the Bey dated 1914 reformed the penal system fairly thoroughly, reserving still the right and duty of the vendetta which tradition strictly upholds. In Morocco before the French Protectorate, the crowned *Sharifs* had laid a heavy hand on certain features of the old penal law, especially to limit the co-juror abuse, namely, the privilege enjoyed by the accused of getting innumerable co-jurors to crowd round him and bear witness to his "morality". In the heart of a tribe only the seven neighbours will have the right to be summoned as co-jurors.

It was the new French Government, however, which was able drastically to prune and cut. From the very beginning in Algeria the Muslim *qadhi* lost his penal jurisdiction. For the last hundred years only French magistrates have been "competent" to deal with offences and punishments. This change of procedure circuitously and indirectly undermined the foundation of the penal system, for it is the business of French judges to dispense French law. In other places the old penal system was openly and directly attacked by the three familiar methods of abrogation, reformation, innovation.

By substituting for the traditional native system French law as laid down in the French Penal Code, the old system was formally *abrogated*. With a few minor modifications the French Code of 1810 was transplanted into the colonies *en bloc*. In the less advanced countries where so high-handed a method is not yet desirable—amongst the Berbers and the Negritos,<sup>1</sup> for example—a transitional procedure is being introduced : instead of promulgating the French Penal Code as one indivisible body of law, which implies the complete abrogation of the old system, only such items of this as seemed shocking were individually abrogated. The *right of sanctuary* was, for instance, in common use in Africa. This was a criminal's privilege of escaping punishment by taking refuge in a Mosque or Temple ; or even sometimes by placing his hand on the entrance gate of some all-powerful lord. This right of sanctuary was directly contrary to the interest of the State, and nothing was in French eyes more

<sup>1</sup> This was written when a decree of February 17, 1941, had equipped the whole of French West Africa with a Native Penal Code modelled on the French Code. See my criticism of this in the Bibliography, No. 11, p. 733, below. The scheme of a Native Penal Code for French Equatorial Africa was much less radical. It was only a re-modelling of the native customary system, and was to be applied "by stages" (*par paliers*).

undesirable. It was therefore abolished on the grounds that it impeded the work of the Courts. It was a *taboo* that was an obstacle to the function of the State as an instrument of security. It was "contrary to law and order".

Another item was *mutilation*. An order of the Governor of French Equatorial Africa in 1930 forbade the practices of mutilation and amputation, whatever their purpose might be, even if the purpose was a religious one, as was the case in the initiations to the magicians' brotherhoods where "bodily injuries" were secretly inflicted. A circular of 1915 forbade the Moroccan Berbers to practise any penal mutilations such as were customary among these mountain people. If the French have not done more in Africa, it is because they have long been afraid of meeting unconquerable resistance by the natives which would make their laws a dead letter; this would be good neither for their authority nor . . . for their pride. A whole new penal code is planned which would mean a very wide extension of the French Penal Code to these countries with only the necessary adaptations.

In actual practice, however, the unflagging influence of French administrators, using advice and pressure, as they know so well how to do—a thing which commentators fail to notice—has succeeded in abolishing, without invoking the law, many of those traditions which most gravely shocked French ideals and French thought, inveterate though these traditions were. Let us not undervalue the quiet, persistent work of the French official in going beyond the letter of the law. As for the *ordeals*, there can be at present no question of stopping them everywhere. In many places they command immense respect as veritable judgments of God; more caution is needed than the young Scotsman displayed!

While the old penal system has been more or less extensively abrogated it has often been simply *reformed*. The principal reason for reforming it has been to make use of some of the punishments of the old system for the French Penal Code, while adapting them to the needs of government. This was done by reducing them to writing and promulgating them as laws and decrees in order to clarify and define them, thus eliminating the element of caprice which was justly complained of. This is why, in Negro countries especially, *collective* punishments and *corporal* punishments have not been abolished. What are you to do when it happens, as it often does, that a criminal cannot be discovered because the natives, who know perfectly well who

it is, refuse to give him away? If you hold by the conceptions of French law, according to which only the actual offender can be prosecuted, the individual author of the offence, are you to abandon the attempt to punish?

When a conspiracy of friends and neighbours defies the law by shielding the criminal, the French hold them as a body responsible, not as of old for every offence, not even for a murder, but, for instance, for setting fire to a forest, a common occurrence in these countries. In such a case, if the real offender cannot be traced owing to the anti-French complicity and obstinate silence of his fellow tribesmen, the French have made use of the traditional native law, while transforming it and adapting it to their need of enforcing law and order, and have proclaimed the village or the district collectively responsible for the offence. The old penal law was thus exploited only the better to guarantee the security and the prosperity of the natives themselves to which such fires were fatal. When Pasquale Paoli<sup>1</sup> was seeking to establish new order in his native island, and striving to prevent the damage and destruction caused by hunters and shepherds, he resorted to the same expedient. He made territorial or family groups responsible for damage caused, when they refused to assist the authorities by informing against the offender!

In the same spirit *corporal* punishments have been adapted to the new French régime. Flogging was legally abolished in all colonies where the French Penal Code was introduced, but it was still sometimes used in practice, at least at the beginning of the occupation. Certain punishments in use by the natives had to be borrowed from them. For French penalties, fines and imprisonment, had little deterrent value, either to intimidate or to reform the numerous delinquents who took a pride in playing the "recidivist". The Negroes are often seized by a violent urge to gratify their vanity by defying authority. The paranoiac who enjoys playing to the gallery is no uncommon phenomenon amongst the Bantu.

In matters of penal law, *innovation* has also been employed both as regards *offences* and *punishments*.

<sup>1</sup> [Pasquale Paoli (1725-1807) was a Corsican general and patriot who successfully drove out first the Genoese and then the French overlords of Corsica. In the intervals of fighting, Paoli proved himself a capable and far-sighted administrator. He twice spent long periods in England, where he was a very popular figure and made many friends, including Samuel Johnson (see Boswell). The British Government granted him a pension and the last twelve years of his life were spent in London. EOL]

New offences were a revelation : acts unpunished by customary law now became offences under the Penal Code, and the schedule of crimes and misdemeanours was considerably enlarged. Theft in particular is no longer tolerated, as it was when the natives knew no distinction, or very little, between *meum* and *tuum* where personal movable goods were concerned : such a thing as theft did not exist, or only in very embryonic form. Tradition gave every man a right to help himself to food supplies or products belonging to his kinsmen or neighbours if he wanted them. This explains why early travellers in distant lands were surprised at being plundered of their movable possessions while the natives, as they discovered later, had no idea that there was any objection to this sort of stealing. The idea of theft is entirely new to the more primitive primitives.

Where we consider *kidnapping* an offence, backward people often consider it a right or even a duty. While marriage by capture is not, as used to be thought in the early days of ethnographic research, a real and effective kidnapping, it is at least a feigned and ritual capture carried out by deeds and gestures which may deceive the administration. It has happened that a French magistrate, seeing a turbaned horseman gallop like the wind carrying off his bride lashed on behind him, has wondered whether this was not a case of cruel kidnapping ! Whereas it was in fact the procedure prescribed by tradition and carried out with the approval of all the interested parties. To punish the *carrying of arms* is another invention of the White Man. The fact that a man has a cutlass or a dagger stuck in his belt or hidden in his bag is an offence known as carrying forbidden weapons. There have been cases where natives were stupidly prosecuted for carrying these traditional objects merely as tokens of rank, as in other places great folk carry the more pacific token of an umbrella—whether with a metal or wooden “stick”—born of our rain-ridden climate !<sup>1</sup> This was an error of applica-

<sup>1</sup> [In such a case the umbrella actually in question may have been an import from the damp climate of France, but the use of the sunshade or umbrella in the East is of immemorial antiquity, as is testified by the sculptures of Nineveh, the frescoes of Thebes and Memphis, and the vases of Greece. It was known in China 2,000 years before Christ. The *folding* umbrella was known in the days of Aristophanes.

The sunshade or umbrella as a symbol of royal majesty has been used in India from time immemorial down to the present day.

It was first brought to France from Italy by Catherine de Medici, but it was rare in France as late as the second half of the 16th century.

See an interesting monograph on “The Sunshade . . .” by Octave Uzanne, London, 1884. EOL]

tion and interpretation : the catalogue of such errors would be a long one, for it would be a catalogue of unintelligent blunders due to lack of the wish and of the effort to understand !

The French view of other offences was not accepted by the natives without opposition. It required armed force to impress on the inhabitants of the Sahara that the *ghazu* was an offence. It used to be carried out by a group of raiders mounted on swift camels who set out for some distant spot to seize and lift other men's cattle, sometimes aggravating matters by kidnapping a woman too if opportunity offered ! It needed a great effort of education and intimidation to put an end to this relic of the past : not by any means always so completely past !

The French have introduced two new penalties wherever they rule : fine and imprisonment.

The *fine* was in some places already familiar to the natives, but not at all in the European sense. Fines countenanced by the Berber customs of the Maghrib, and notably by the Kabyles of Algeria, were not imposed for the benefit of the State or of the Chief, but, in part at least, for the private profit of the victim of the misdemeanour. They were divided between the Council of Elders and the injured family. The tax-fine, the collection of a due penalty for the benefit of the Treasury, is a new procedure, often little understood by the parties concerned. If and when they have the money available they do not look on the fine as a punishment ; kinsmen and neighbours subscribe, as they were wont to do in olden days on other occasions, to provide the condemned man with the means of paying his fine ; it costs him nothing therefore beyond the implied obligation to do as much for them another time !

Less than thirty years ago in Egypt it was a common thing among the *fellahin* of Saïd for a whole village to raise a subscription in order to pay the fine due by one of its inhabitants : a practice forbidden in the colonies by the French Penal Code.

To the natives of the French colonies *imprisonment* is a new idea. For one of the symbols of the State is the prison built expressly to confine delinquents. The Negro kinglets had their dungeons, but no prisons. Imprisonment may therefore be for the natives in certain cases more cruel, in others less so, than their old punishments would have been.

Sometimes more cruel, as we have seen in Abyssinia ; when the detention was long, a life imprisonment perhaps, despair would overcome the condemned man ; he often died of it after

a few years ; and imprisonment in Abyssinia was harsher than under the French. It may on the other hand, be less cruel, especially in Islamic countries. The Egyptians and Algerians have no objection to going to prison ; for while in gaol you are housed and fed ; much better housed, much better fed than the innocent *fellah* outside ! Public opinion saw nothing in the least shameful about being sent to gaol ; on the contrary, a man felt a certain pride in thus getting—oddly—into touch with the authorities. I have myself observed that a man's release from prison constituted in Egypt a festive occasion for his fellow-villagers, who assembled in front of the building to do honour to this fortunate comrade and carry him home in triumph !

Another new idea was *banishment*. The fact of being exiled from their native country, of being cut off from all their kinsfolk and from all their neighbours, of being absolutely uprooted and thus losing all their rights in their own community, made banishment in their eyes one of the severest possible penalties, much more severe than it would be to a European.

Lastly, the corpus of offences and punishments, known as the *indigénat*, which has been drawn up by the Administration and not as in France, by the legislature—*nulla poena sine lege*—this *indigénat*, softened and tempered as it is in our time, is to the native a galling innovation, against which he is here and there already beginning to protest. This unprecedented form of penal law, which is as we see not always identical with French law, is from the point of view of French law a deviation and an aberration.

From all this it is clear that the French system of punishments is not welcomed by the inhabitants without protest or opposition. In distant corners, in remote up-country places far from the eye of authority, they surreptitiously and obstinately bring their ancient penal law again to life.

Even amongst the Kabyles the text of a *ganun* has been found, the record of the customary law of a Berber village which was being circulated secretly—"under the bournous", as we might say. One article of this document prescribed a fine, payable as usual to the *jama'a*, the Village Council, for anyone who denounced a crime or misdemeanour to the French authorities, thus preventing its being dealt with according to native customary law.<sup>1</sup> The old resists the new, often with vigour, sometimes with success. Desire to reform does not always mean ability to reform !

<sup>1</sup> See L. Milliot, *Hespéris*, 1926, No. 4.

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## PROGRESS OF LAW AND ITS RESULTS

In conclusion we must briefly review the dominating facts which we have observed, or caught a glimpse of, that govern the legal conflict of European peoples in contact with overseas countries. It is a conflict unique in kind, and by no means a mere "conflict of laws" in the ordinary sense, for the climates and the actors are exotic. It is between groups—the dominant group and the subordinate, the governing group and the governed—who are in fact *different*, and in law *unequal*.

They are *different* in fact and, the better to express the contrast between them, I have ventured to say that they are *strangers*, foreigners. The state of advancement which they have reached is not the same—far from it. The ruling people belong to a State or a Colonial Empire; they are of one nation, or as in the case of the English, several nations organised and federated. The people ruled are of a tribe or town, or a group of tribes or towns, but they are neither a nation nor a state, nor have they the corresponding attributes—unity of speech, unity of power—formally granted, permanently maintained. They lack conformity and continuity.

From the legal point of view they are, almost always, *unequal*, since up to to-day, at any rate—without prejudice to to-morrow—the one of the two groups in contact is master and the other subject; the one ruler and the other ruled. Though it is true that we increasingly desire, the French especially, but other European nations too, that there should be partnership and an integration of the two groups concerned, they remain unequal in their relation to the law: the one is superior, the other inferior; the one makes the laws, the other has laws made for it. We need feel no surprise that the actual contact and the legal conflict between these different and unequal groups demand the constant intervention of the ruling state to secure order and progress amongst the ruled.

This is the cardinal fact of the collective conflict in overseas countries: the perpetual interference of the ruling group in the fate of the group they rule: and this notwithstanding the fiction of non-interference, very solemnly proclaimed by our French

laws. Ten times our French legislators have promulgated the policy of Gallio, the brother of Seneca who was in Roman times proconsul in Corinth, when the Jews haled the agitator Paul of Tarsus before his judgment seat : " O ye Jews . . . look ye to it ; for I will be no judge of such matters." <sup>1</sup> French policy is Gallio's, at least so it would seem from the text of French decrees. The governor who hastily takes a plane to rejoin his post, " hurries to keep aloof " if we are to believe the laws.

His task will be by stern experience—often all-too-short and which his successor will have to go through in his turn—and by diligence to minimise the inevitable interference which always takes place and is bound to take place. This falls under three main heads : the *object* of action, the *method* of action, the *effect* of action : the *intention*, the *procedure* and the *result*.

The *object* of his action, his conscious or unconscious aim, may be summed up in one word ; he seeks *comfort*, but the comfort of all, of the ruled as well as of the rulers, whereas in olden times men preached *salvation* or sought for *happiness*. In the early days of French expansion the aim was to impose salvation on subject races, or at least to ensure their happiness. This was too ambitious a design, and was abandoned by the States for the reason, or on the pretext, that salvation and happiness are relative not absolute values. To each his own salvation, to each his own happiness ; it is true that for different peoples " each his own truth " holds good in the moral and human sense, according to the various states of society.

Material and spiritual comfort, more ease and repose, more profit and more hope ; these things pre-suppose three beneficent conditions : *security*, *prosperity*, *morality*.

To be able to go and come, to be able to act without peril of any kind : that is *security* ; to work and earn without fear of being frustrated : that is *practical* security. *Legal* security is achieved by the drafting of laws and the definition of rights, so as to give to contracts and transactions the simplicity and the stability which provide protection and guarantee.

To enrich *ourselves* while enriching *them* : that is *prosperity*. " Enrich us, enrich yourselves " is the slogan. Buy more, and become what has long been termed " a good consumer " ; to achieve this you must develop resources and export goods, you must produce and make a profit : such are the mainsprings of prosperity.

<sup>1</sup> [See Acts xviii. 12-17. EOL]

Comfort and consolation in the spiritual and human sense : that is *morality*. Under every sky where they hold sway, the French aim at creating a moral order beneficial to both populations ; reforming not only what they find *inconvenient* and damaging to their interests, but also what they find *shocking* to their feelings. They claim, rightly or wrongly, that they are striving to promote and guarantee to the colonies a moral idea, not only in the relationship of "master" to "subject", but also in the relationship between "subjects"! Thus understood, morality has wide implications! We may thus express them :

First comes *humanity*, humanity pure and simple, a negative not a positive ideal : not to shock, not to injure, not to bully, not to ruin others. Next comes *dignity*, which the French try to confer on their overseas peoples by respecting in them—and making others respect—both in *de facto* and *de jure* relationships their honour, their legitimate pride, their traditional ways of life and thought. The "policy of consideration" has this end primarily in view. *Liberty* is also implied, but a limited liberty, affecting the relations of father to son, of wife to husband, of chief to subject. This liberty puts an end to despotism, to arbitrary power, to all that is anarchic or degrading. It guarantees certain "rights of man" pending the day—near perhaps, perchance far off—when they will be proclaimed. Lastly, *equality* comes into play at least in the plane of law, in proportion as the French transform their domination into a partnership involving consultation and the native's taking a share in the designs of the ruler. Such is already the case in those countries, in many ways privileged, which the French call the old colonies. It is the same too in at least one English case : the Maoris of New Zealand have in their own country exactly the same rights as the English ; they are Members of Parliament ; they are Ministers, such as in the French colonies every "graduate" dreams of being.

The comfort aimed at is the *common* comfort of all. In olden days all that was thought of was the comfort of the rulers and the European enterpriser. To-day the claim and intention is to seek the comfort of all, bilaterally and reciprocally : to ensure order and progress, intimately linked for the common benefit and the common advantage.

Such being the objects of French action, what are the methods? What procedures are brought into play to secure more comfort in the colonies? Legal methods, since those are

the only ones that figure in our "technique of progress". We must distinguish between *actions* and *agents*.

The *actions* of the French are all those changes which they impress on overseas law, after having stated that they would let it develop and evolve in its own way, as it was doing before their arrival ; changes which are veritable revolutions on five different planes.

The act of passing *from oral to written law* was a revolution in the form of law. It passed from traditional to regulational law, from customary to legislative law. It was the re-editing of the ancient system by the very deliberate intention of the legislators. So far was it carried that a script had to be invented and presented to peoples who possessed no writing, so that a written law might be set up for them ! From speech to writing, that implies records, the registration of the judgments of the Courts, the preservation of legal files for continuity and security.

The act of passing *from secret to open law*, from concealed to public law, from occult to proclaimed law, was another revolution. The old traditional and customary system was preserved, transmitted by the ears of the old men—as the phrase ran in Madagascar—and dispensed by the initiates alone ; to-day there is law unconcealed, known to all, being recorded in writing and more and more open to public criticism ; a law of which no one henceforward may "plead ignorance" as the saying goes ; a law which consequently will offer the native, I had almost written the commoner (*usager*), more stability and security.

The act of passing *from parental to national law* is a third and the most fundamental revolution. Almost always, if not always, amongst the less advanced peoples of the colonies, law is a tribal or family affair, and therefore parental. You belong to a group which consists of your kinsmen or those whom you believe to be your kinsmen—whether they really are so or not—and all of you believe yourselves to be the descendants of the same distant ancestor—mythical or not—you believe yourselves to be all of the same blood and of the same spirit. To be a kinsman or not a kinsman—"to be or not to be, that is the question !" To be a companion or a stranger : that changes everything. The great fact of French rule is that there now is a common, territorial, universal law, valid for all, weighing on all, a national law in the fullest sense, which has nothing to do with kinship, nothing to do with religious faith, nothing to do with the complex of interwoven bonds which used to create groups in the colonies. There

is one unified law or, as we might better express it : one *unity-law* (*droit-unité*).

The act of passing *from ritual to secular law* is an act closely akin to the preceding, to the transformation of parental into national law. When tribes and towns were grouped together under the banner of one great religion, when moral unity was achieved by the success of one universal cult, notably by the triumph of Islam, law was ritual, religious law. No one conceived that one and the same law could prevail throughout a given country for *all* the inhabitants unless these all professed the same religious faith. Even the Turks, much more progressive people than has been recognised, even they never dreamt of imposing their laws on the Jews and Christians of the Maghrib. That was an idea which never crossed the mind of good Muslims. It was the French who recently for the first time secularised, in order in the first place to *unify* and secondly . . . just to *secularise*. There was to be the same legal system for all the inhabitants whatever their religion ; the attempt tends towards simplicity and security, since at every level there is greater unity.

The act of passing *from communal to private law*, from collective to personal law, is the fifth and last of these legal revolutions. Most frequently though not always, the parties concerned were collective. They were families, or tribes, or fractional groups of various kinds who had rights ; they were never, or practically never, individuals, "particular persons" either in the active or passive sense. Two families for instance made a contract uniting a young couple ; families or tribes sought vengeance and sought it in more recent times before Councils and Chiefs. To-day, however, individual rights are increasingly disclosed by French laws. The party to a suit in the colonies is now, thanks to the French, usually an *individual*. On the legal plane the French may be said to have created the individual. They are the inventors, of individual rights in their colonies.

Keeping our minds still on the methods of French action we may sum up all these phenomena as marking progress *from the obscure to the precise*. Law was obscure when it was oral, when it was secret, when it was tribal, when it was ritual, when it was social law. It was uncertain, indeterminate ; too often it spelt ever-recurring conflict and fighting. In reducing law to writing, in making it patent, public, territorial and national, above all in making it individual, the French have made it certain, clearly defined, less and less open to question. The aim that has been

achieved has been to convert the doubtful into the certain by fixing and at the same time changing it. The procedure that has been everywhere followed and realised of *defining* rights in their data and their consequences, is in line with French modes of thought. It is in this positive sense, and of course no mystic sense, that the French were predestined not to conquer but to establish order and progress in distant countries. The fundamental characteristic of the French mind is revealed in defining, delimiting, organising, and bringing into the jungle of tradition *clarity through unity*.

In doing this the French are founding the *State* in the Roman and French sense, which is firmly based and established in that it means Law reigning over all and obeyed by all. The State is thus the *statut réel*, national law in operation over a given, defined area. The State is also *law and order* imposed on all without exception. Finally the State is also—to use the English expression—the Keeper of Records, the maintainer of archives, where documents are preserved and title-deeds transcribed to preserve rights. The State is finally the Raiser of Taxes, since it is an expensive business providing a written, public, universal law to be always obeyed. *Order, records, taxes*: these are aspects of the State: these are the seals the French set on their colonies.

Having dealt with the methods of French action, let us consider the *agents*.

First there are the *rulers* (*gouvernants*), who will sometimes intervene, *manu militari*, in a way unwelcome to the ruled, to impose that order and that progress which they wish to see prevailing. Apart from the *rulers* properly so-called, the legislators and administrators, and indeed before them in time and more important than they, there are what we might call the *itinerants* (*circulants*) and the *residents* (*habitants*). The *itinerants* are the passers-by, the explorers, the travellers; and then the "tourists" who exercise no negligible influence on the state of mind of the original inhabitants. Who can measure the changes which the tourist has brought about in the customs and the laws of these countries? The *residents*, all the colonists, and the people who settle for a considerable length of time, all these have an influence, of which they are not unaware, on their servants, their suppliers, their clients, their partners and their enemies . . . Adding these things together, their total influence is very active.

Nor must we forget the contribution of the *ruled*, those who on their own initiative have worked in favour of order and

progress. Among these are some monarchs, some great ones like the Emperor Gia-long in Annam over a century ago. There have been little kinglets too, and simple tribal chiefs, sometimes forming a precarious confederation of small native clans. Finally, there have been individuals who have returned home after spending some time in France and have brought new ferments into their tribe. They have found followers and have helped—often unawares—to encourage unprecedented novelties in laws and manners. It is through such individuals that *partnership* between rulers and ruled is freely brought about, producing change : for better or for worse.

The *effects* of all these influences, their results, desired or undesired, may be beneficial, or alternatively, harmful.

In early days, more frequently than at present one result was the *disappearance* of the conquered people if they were too backward to adapt themselves, or to be adapted, to a new scheme of life. This was the tragedy of the Tahitians, the “Immemorials” as they have been aptly called,<sup>1</sup> whose being centred wholly in the past, slaves of their own traditions and therefore doomed to elimination in the various ways we have described.

A second result, increasingly manifest nowadays, is the *opposition* between rulers and ruled, because the latter do not willingly lend themselves to the adaptation which the former propose or perhaps seek to impose. This opposition may take the form of mere *repugnance* or of active *resistance* : two degrees of the same thing. It may show itself in active defence against the law-giving of the rulers or in veiled and perverse refusal to co-operate, a “passive resistance” sullenly maintained and keeping alive a feeling of hostility which the rulers find extremely difficult to overcome.

This does not exclude a third result : the *preservation*, sometimes even the *revival* of a recent past. The French are fortunately beginning more and more to understand that an established order which has proved lasting, however coarse and crude it may be, ought, as far as possible, to be preserved in an adapted and improved form. That is in fact the only way to preserve. No one should blindly destroy, out of fatuous vanity or for the pleasure of asserting his own power, a system of law which had its value. The French wish to conserve, and they are fortunately striving more and more to do so, not overlooking their neighbours' example. At times they have done even more ; they have

<sup>1</sup> [See p. 459. EOL]

restored and re-established a customary law already abolished, and have brought again to life institutions that were already obsolete when they occupied the country. This rebirth of the past is undertaken whenever it is thought that it would benefit the native . . . and the new occupier of the country.

The last but not the least result, and one which always occurs—often unsought—is the *reform* of the customary law which often goes so far as *innovation*, when some previously unheard of statute is introduced of which there was no equivalent in the old system. The railway code for instance leaps to mind. New objects and new needs bring new regulations. This transformation is far-reaching. We have shown on the plane of law, of labour, and of craftsmanship, in what ways material progress in the colonies is more advanced, often much more advanced, than it is in France. The French implant and invent and apply in their colonies many things which they could not do at home. Many *procedures* and *processes* are “perfected” in the colonies, where you can start as it were from scratch and with a clean sheet. This is one of the meanings, amongst others, of the term “new country”. It has, for instance, been possible to build houses and towns and a whole new “urbanism”, on empty land without demolishing anything! Witness the Torrens Act,<sup>1</sup> the Land Registration System which extends as far as Indo-China, but does not exist in France!

Nevertheless, this transformation displays characteristics which demand attention. It is *progressive*, advancing by degrees and therefore by starts; it is *unequal*, advancing according to surrounding circumstances and therefore according to locality. It does not always show either the same result or the same value. A crucial fact which people all too often overlook is that the various *countries* of overseas colonies are inhabited by peoples whose condition and development are very varied. There is another fact to be borne in mind: that even in the *same country* you always meet some advanced and some backward people, some acquiescent and some recalcitrant people; some people who march forward, and some whose thoughts are always towards the past. Hence we must never imagine that a moment has come when the same system can be imposed on all the inhabitants

<sup>1</sup> [Sir Robert Torrens introduced into South Australia in 1857 a system of *Registration of Titles to Land* which proved so valuable that it was quickly adopted by the other Australian States, by New Zealand, most provinces of Canada, and by other parts of the British Commonwealth. It was also copied by other countries. EOL]



of every colony. We must give separate, distinct attention to the *advanced* and to the *backward*.

The *advanced*, the frenchified, are sometimes called the "evolved". These have had to be dissociated from their tribe, to live in a new spirit according to their new needs.

The *backward* are those of arrested development, whom a company commander would call the stragglers, who follow the column limping and out of breath, and who must be considerably coaxed into improved ways. There must be a diversity of solutions : we get a glimpse of this as we examine the facts.

We must repeat that transformation supplemented by innovation in the colonies, has above all revealed the individual. This is the most profound of the changes wrought. The French have created the individual with his own property, his own activity, they have endowed him with dignity as well as liberty ; they have guaranteed his individual rights : the right to possess, the right to work, the right to travel, the right to earn independently of the old-time group. Thus in the material plane a most important new phenomenon is seen in colonial countries : *personal work* which immediately becomes *rational work*. It is no longer the group, with its traditions, and its superstitions, blindly followed and obstinately guarded, which is the driving force and the agent of all that is done. It is now the individual who is an owner, who is a wage-earner, who is a worker, who is a director, who is a speculator and an exporter, who draws cheques on his private bank account. To-day it is he who is the producer, master of his own actions as of his own earnings. He is thus able to indulge in rational ordered work directed by reason and calculation. He is weighed down by nothing resembling the *collective customary* burden under which he laboured in olden days.

It matters little that all these changes have been wrought by *injunction* or by *suggestion*. Now imposed, now proposed, their effect has been to create the French Empire in a legal sense, from the fact that the legal traditions of the native inhabitants have been most profoundly changed. This is the phenomenon of the Empire : unity of law to provide for security, prosperity and humanity. This unity, however, has been realised and consummated, not brutally and suddenly, but by partially and gradually approximating to each other two systems that remain nevertheless distinct. Diversity must exist in the countries of the French Colonial Empire : in the languages, in the manners, in the systems, as in the minds and in the ideals.

If we Frenchmen are always the *bearers of unity*, if we wish therefore to act usefully and rule happily, we can do so only if we are wise enough to preserve the variety of our overseas Empire, that variety which gives pleasure and creates beauty. For every human society is a work of art.



## EPILOGUE

### POSITIVE COLONIAL POLICY

Having attempted to recapitulate the facts, I must now round off this account with a conclusion. The *conclusion* will be also a *forecast* : for the ultimate aim of objective study should be action : scientific, methodic action founded on reason, experiment and observation, guided by calculation and tactics, not by some visionary chimaera, still less by passionate fanaticism : *deliberate* action, neither inspired nor mistaken. Let us sketch in outline such action as should govern the relationships between rulers and ruled. This implies sketching a *positive* "native policy", or drafting an *applied* "colonial sociology". Three elements must be recognised : the *objects* of such action ; the *methods* of such action and the *errors* of such action.

The *objects* of this action are the theses and ideas which ought to direct *positive policy* in the colonies. This phrase is Auguste Comte's, the inspirer of sociology, the founder of the study and the coiner of the word. He was the first who ventured to assert that no action is valid and legitimate that is not founded on knowledge ; that before you attempt to mould the future you must penetrate the secrets of the present ; that law-givers and administrators are not omnipotent ; that you must rise in revolt against those lawgivers who are wooed by philosophers and over-encouraged by the commentators—men like Helvétius and Sieyès—who claim for themselves the magic power of remodelling, or recreating, the whole social order without opposition or control. Thinking of themselves as magicians, they believe that the decisions of the rulers have unlimited power over the order and progress of the societies they rule. They are under the illusion that the ever-infallible *mana* of the people has been breathed into them by the votes of the electors or the will of their protectors ; for them real Truth resides in the supernatural.

Let us therefore remember that every technically and morally justified action must be scientific, and consequently methodical ; that it ought to draw its inspiration from reason and not from passion, and be the product of calculation not of impulse. To

achieve this, it must be *prepared* and *informed*. It must be *prepared* and not improvised ; worked out and not opportunist ; it must be carried out by planned and premeditated effort. Never, therefore, must you act suddenly and haphazard by some accident or to meet some occasion ; you must assemble your materials and get your instruments into position : all of which requires Time, the lord and master of creative work. Your action must also be *authorised* and *informed*. The whims or wishes of the law-givers must be inspired and directed by the authorities or by experts of ability. The artists in this case are the men who *know* and therefore who *can*. In the current jargon of to-day, action must be *directed*, but founded on the data of knowledge, and not on the "plans" hatched out by amateurs and writers of romance. You must give right of way to those who possess knowledge and wield authority in other spheres than newspapers and meetings, and invite them not only to advise on the *methods*, but to offer their opinion on the *objects* of your action by suggesting the goal and the aims. Let the competent and the well-informed state the aims and set up the targets, let them *design* the action and the *methods* of putting it into effect.

To mould the future you must know the present : to know the present you must also know the past, which in many ways explains the present. To be well-informed as a "scholar" you must begin by assembling and ordering your facts, describing, defining, classifying, comparing. Above all you must penetrate and understand the meaning of the facts, and grasp their underlying significance ; to sum it up, you must *explain* them and be able to trace their immediate results. You must cultivate the feeling that all these facts of community life have their nature and their tendency, that they follow their own line, that they are not governed by the caprice of law-givers and reconstructors, but by their own *laws*. If you are to grasp the nature and the tendency of these social facts you must have the "scholar's" two instincts for *necessity* and *diversity*.

The instinct for *necessity* means knowing that all these phenomena, governed as they are by what we call *laws*, are in the present indissolubly linked to their past, as their future will be linked to their present. This is what Auguste Comte has said :

the scientific doctrine of policy considers the social conditions under which observers have always found the human species existing, as the necessary consequence of its organisation. It conceives the aim of these social conditions as determined by the rank which Man holds

in Nature's system as this is fixed by facts without being thought to be capable of explanation . . . It farther conceives that for each degree of civilisation political combinations have as their sole object to *facilitate the steps dictated by the nature of things*, after these have been precisely determined.

In other words, the idea is that social phenomena are not at all unregulated phenomena, but that they *march* along their course. Legislators cannot, without evil result, give rein to their fancy for reversing and destroying. The line along which these phenomena are moving must first be ascertained, and then by constant effort prolonged or corrected.

The instinct for *diversity* means paying attention to these social conditions which are poles apart, ranging in these countries from the primitive to the civilised and the ultra-civilised ; understanding and penetrating the almost-infinite complexity of the *social types* which exist amongst the natives of the French colonies. Another dictum of Auguste Comte's is this :

Up to the present Man has believed in the infinite power of his political combinations to perfect the social order, and has thought that as a necessary consequence the Absolute has always reigned and still reigns in political theory. The common goal of political theory is to establish the eternal type of the most perfect social order, without having in view any determined state of society.

Fortunately this cannot usefully be put into practice. The last thing that the French should wish for their colonies would be to set up in them an ideal State, framed on a universal model, equally adapted for every land and suited to reign under every sky. On the contrary they should rather adapt their procedure to the social conditions which they find prevailing among the natives and should base that procedure on reason. For the solutions must vary with the problems. According to the various climates and the various circumstances, the *possibilities* and the *facilities* vary in each and every case. The human animal—the social animal—is no “raw material” to be “machine-finished” in a factory. You cannot treat each one in the same fashion or in the same spirit ; peoples are “living bodies”. You cannot define in the Absolute either what *can* or what *ought to be done* !

. . . . .

Having dealt with the objects of action, we must turn to the methods. Knowing that you have to deal with matters that are *regulated* and *diverse*, you must beware of vast plans and

grandiose designs, such as we attribute to those ambitious folk who imagine they possess unlimited and irresponsible power to recast and remould the world for their own glory and profit. You must seek your rules of action in the lessons of experience and observation, drawn from peoples older than your own, and sometimes from the Ancients as well as from nearer home, and you will find three golden rules : *adapt, be tolerant and considerate, teach.*

The man who draws his inspiration from the *necessity-diversity* principle will be anxious to *adapt* his action to the people whom it affects or will affect ; he will seek to adjust it to the living men who are its objects. In the colonies as everywhere else this is true in two senses : the *collective* and the *personal*.

On the *collective* plane, you must adapt your action to existing societies and groups ; you must not apply one and the same procedure to the very civilised, the civilised, the less civilised, the slightly civilised and those whom—no doubt unjustly—we stigmatise as the uncivilised. In this matter the Dutch have perhaps acted more wisely than the French. They have issued various regulations to apply specially and only to backward peoples ; a whole special system of government has been devised exclusively for the “ savage ” peoples in remote regions.

On the *personal* plane, you must adapt your action to different individuals. The individuals within each group do not react to your measures with the same emphasis, in the same spirit, and at the same moment. There are resisters and adopters ; protesters and accepters. More than once it has been found necessary to separate the two categories. The question is mainly one of those “ evolved ” persons of whom you hear so much, for whom the French have had belatedly—often too belatedly—to devise a whole special system.

So you must adjust, keeping yourself always well-informed, always on the search. At every step this guiding principle will appear and re-appear. In order to adjust, you must experiment as much as possible, exactly like the research worker in Biology. In a particular area, for a particular set of circumstances apply legally some measure decided on or desired ; check the result, at least the immediate result, within a closed and limited circle. If the effect is good, you can then apply that measure to entire peoples. Until the very most recent times the French have not done this. They have passed laws all in one piece, all at one blow, for the whole of their Colonial Empire or for a whole

group of colonies, committing blunders of which I shall presently speak. They have now fortunately embarked on the experimental policy, inspired perhaps by a forgotten book of Léon Donnat's called *Experimental Policy*.<sup>1</sup> This is only one aspect, on the concrete plane, of the positive and scientific policy which I have tried to define at the beginning of this epilogue. In Algiers they have recently changed the status of the municipalities. Acting on the idea of experiment, they have for the present applied the new law to some places only, so as to ascertain, as exactly as possible, what the result of the new arrangement will be. If it works out well, they will then extend it to other places. This ought to become their usual practice in the colonies.

Then comes the question of *tolerant consideration*. You must stress the transition from the present to the future ; you must be prudent and cautious if you are to transform and innovate successfully. Even if you have tried an experiment, as has just been suggested, and find that a change seems desirable and that it probably ought to be made, you must still smooth the path that is to lead from the present to the future, so that the native may find it attractive and be insensibly and progressively introduced to the new conditions. In aiming at *progress*—in the common interest, as always, of rulers and ruled—you must not sacrifice *comfort*, you must let no one suffer by too drastic a measure, nor pay too high a price in upheaval and devastation, for your innovation. Progress will therefore have to be *conservative transformation* ; for the future must emerge from the present as a natural "evolution". To secure this, you must first have investigated and understood the present so as to be sure in what direction it *ought to be* and *can be* amended.

You must strive to achieve *progress without discomfort* : manipulate the transition cautiously to avoid all those miseries that in the past have been the price paid for improvements, the cost of the new. You have frequently heard of the grave psychological crisis which the convert often goes through ; let us remember that in the colonies every change involves a conversion. Tragedy ensues if the change is too brutally abrupt, if the best way of bringing it about is not sought and found. Writers who have lived for long years in the colonies and who know the native mentality, have painted in moving terms the dramatic crisis which often disastrously disturbs the balance of the native's mind. M. Bonjean who lived in Cairo and in Rabat has in his book

<sup>1</sup> *La politique expérimentale.*



*Mansour* expressed better than anyone—such at least is my personal opinion—the irreparable and irremediable suffering, caused by an abrupt change, made without preparation or consideration, which was imposed without a moment's delay out of sheer pride !

Finally you must *teach* : that is you must as far as possible by propaganda and discussion, persuade and educate the natives ; you must convince those you rule that the interests of order and progress demand a change in their customary law, and that this change will redound to their benefit and ours alike. Persuade before you insist ; try first to enlighten them by long and patient exhortation, as French teachers do in Islamic and Negro countries, in their unobtrusive and too often insufficiently appreciated work. Preach first to the young ; to the elders and old men last ; do not compel unless it is necessary where you meet with a check. Aim at the " happiness " of these overseas people ; make them happy, if necessary in spite of themselves, but this only if you are sure that it is absolutely necessary and in the best interests of these immature peoples.

In reforming the system of these countries you will find two phases : *acceptance* and *co-operation*.

*Acceptance*, or at least resignation, is a passive thing : you meet it when the native accepts French laws without protest or opposition, acquiesces in them from the first with a sort of fatalism and then little by little, as we find everywhere, begins to like them and accepts them deliberately. Sometimes he even goes so far as to ask for and invite them. This has occurred in Algeria where the people have asked the French authorities to proceed, when they were hesitating to interfere in this matter or in that, and have suggested changes which the authorities had not intended to introduce so soon. You find passive acquiescence or simple submission changing into inclination and increasingly deliberate choice. This is what we might call a *moral rallying* of the natives to French action.

*Co-operation* is an active thing ; you meet it when the native is anxious to act in harmony with the French to bring changes about, to promote that order and progress which the French conceive to be their mission in colonial countries. The co-operation of the native in the work of the French though sometimes compulsory is often spontaneous, and it is the characteristic mark of French rule. In the course of time—now a longer, now a shorter time—Native and Frenchman have arrived at

actively working together for the same end. The advanced, the frenchified, that is to say the "élite", act with and for the French to reform the old legal system. Sometimes, as we have found in Algeria and elsewhere, they make the pace a shade too fast for French taste ; they want to march too briskly, they get out of step and the French have to put on the "brake" a little. Here you meet co-operation, spontaneous collaboration of the native, seeking with the French for the right path.

Such are the methods foreseen or at least divined by the best French minds before Auguste Comte finally formulated them. It was Montesquieu and Bentham, those two great legal theorists, who forcefully recommended that in such cases the ruler should adapt with consideration, should teach, should suggest, rather than impose, and should gently divert the stream of tradition into the new bed designed for it. It was Herbert Spencer who saw that to rule without drawing the subjects into partnership, without winning over the natives of the colonies to co-operation, was to violate the liberty of both sides ; that slavery abroad sooner or later begot slavery at home : that to enslave others is to prepare to be enslaved !

. . . . .

We may detect *blunders* in action, both in the past and in the present, whenever action, either in its objects or in its methods, was at variance with the principles of the Method.<sup>1</sup> The gravest *sin* is the sin of pride or arrogance, which arrogantly presumes to rule all-mightily the world overseas, heedless alike of necessity and diversity, respecting neither the tendency nor the nature of human phenomena, failing to observe, methodically and positively, the present state of affairs, and recognise it as the product of the past, so as to be able to guide and transform in a spirit conformable to past and present. The blunder of the intemperate assimilator is that of Helvétius and Sieyès, who thought that the French lawgivers had before them a *tabula rasa*, a stretch of featureless unencumbered ground in which to delve, on which to build. These men were pursuers of the Absolute, seekers after a Truth valid for every country and for every clime, to which all men ought to submit ; they were intellectual proselytisers of whom Gobineau said that they were living witnesses to the "propagandist mania" of the French. This is to express

<sup>1</sup> [The 6th and last volume of Comte's *Positive Philosophy* was published in 1842 ; this great work expounds the method he recommends for a "positive policy." EOL]

it too strongly, for the spirit of the French is normally better balanced and more moderate. It is true that the French have at times—and they are not the only people to make this mistake—flattered themselves that they could, without restriction or transition, everywhere impose their laws and their decrees by the decision of their Courts, calling this *Written Reason* which they arrogantly thought should reign in every place. The evils caused by this error cannot be too frankly and firmly denounced. There are three most injurious things which must never be done or permitted, when an administration believes it is legislating in favour of irreversible progress: *devastation*, *dispossession* and *distortion*.

The brutal destruction, without remorse or consideration, of the things of yesterday, the rules of yesterday, results in *devastations*. They arise when men despise a past which they think outworn, and which sometimes the French governor or magistrate deems negligible; sometimes he is even unwilling to be informed about it, lest he himself should be contaminated by the infection of customary law—for is he not the guardian and trustee of “Written Reason”? Many a time he deliberately stretches out his hand for a copy of the French Civil Code without deigning to enquire what used to be, before his day, the ancestral custom of the land. This you must not do. You must never destroy something which has endured, unless accurate observation has strictly and fully proved that this action is imperatively necessary and unquestionably beneficial. You must not scatter ancient tribes which used to have their own chiefs and their own laws; you must not dissolve the old craft guilds, only to have to restart them later after all too long an interval; you must not overturn arts and cults which could at worst be adapted and refined to pave the way for new cults and new arts.

Confiscations and dispossessions are to be reprobated, though at first the French mistakenly thought them to be in their own interest. You must never confiscate, unless observation proves the absolute necessity of doing so. You must never set up *cantonments*, as the French at one time did, nor pursue the policy of *driving back* (*refoulement*) the natives, the better to be able to develop and cultivate the land. You must rather endeavour—as the French have recently been doing more and more—to encourage development and cultivation, on organised “perfected” lines, by the united labour of Native and French colonist.

You must prevent the *distortion* of French written laws by

their being transplanted to other soils without discernment, and without consideration for the ways and feelings of the natives. If without reflection you import bodily into the colonies French institutions not suited to all these countries you produce only parody and caricature. These fantastic distortions are the most glaring example of the obstinate determination to assimilate at any cost ; they are clearly seen in the law courts and the elections of the French colonies. You must not conduct elections of the French type everywhere ; you must not set up French law courts everywhere : it is a mere mockery of French institutions which cannot cross the seas without modification and adjustment. " Truth in one place, error in the other " as Pascal said.

Such should be your *ideal*, based on *Reason* : let the future grow out of the present, as far as possible without danger and without pain. The ideal is to pass from domination to partnership, to amplify the social ties between rulers and ruled, to proceed from *power* to *harmony*. It is to institute in unified empires—sometimes in the immediate, sometimes in the more distant future—society and friendship as the Greeks understood them : society, the harmony of interests ; friendship, the harmony of feeling. Hence you must in colonial countries bring to birth common profit, common comfort, common pleasure ; arouse an active common ambition ; and perhaps some day a common dream.

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# APPENDIX I

## PROGRAMME FOR A COLONIAL SOCIOLOGY

- I. Introduction.
  1. General Sociology : Human groupings ; human relationships.
  2. Colonial Sociology : The meeting of two societies in the colonies through domination, or association, or liberation.
- II. Groupings in the Colonies.
  1. The Society of the " Ruled "—The world of " Natives ". Ages and Sexes. Tribes and Clans. Families and Households. Crafts and Ranks. Sects and Nations.
  2. The Society of the " Rulers ". The World of the " Whites " : recruitment, activity, transformation, degradation, elevation.
- III. Relationships in the Colonies.
  1. The *Opposition* of the two Societies. Disappearance, degradation of the earlier inhabitants. Protests and demands.
  2. The *Adaptation* of the two Societies. Transformation of the Ruled. Transformation of the Rulers. Civilisation, its Paths and its Agents. Collaboration and Aggregation.
- IV. Conclusion.
  1. The *Objects* of an Applied Colonial Sociology or a " Positive Policy " in the Colonies.
  2. The *Methods* of an Applied Colonial Sociology.

## APPENDIX II

### PLAN OF ENQUIRY CONCERNING THE PROGRESS OF LAW IN A MUSLIM COUNTRY (1935)

Amongst the *social* changes which may occur, *legal* changes must take the foremost place. During the last hundred and fifty years there has sometimes been a change of *legislation*, a change of *jurisdiction*: new laws and new judges. This change (now evolutionary, now revolutionary) is an important phenomenon which might well engage the attention of an enquirer who was both a jurist and a sociologist. *Rara avis!*

Here is the slight scheme for such an enquiry which I drew up for Algeria (No. 11 of the Concise Bibliography which follows).

#### 1. The *Effects* of the Change in Law.

First, the advantage of *written* law over customary law: the appearance of *Codes* in a Muslim country. The *sunna* and the *urf* superseded by the *qanun*.

Secondly, the growth of *territorial* law at the expense of personal law. There is a tendency—as there was formerly in France—to adopt laws applying to all the inhabitants of a certain circumscribed area. The resistance of Muslim law has not been able to prevent this great change: this is “juridical nationalism”. It is the ambition of the Wafd to see the establishment of an Egyptian legal system and an Egyptian bench to have jurisdiction over all residents in the country regardless of religion or nationality. The Syrian problem has arrived more than halfway there: to nationalise the law by secularising it.

#### 2. The *Agents* of Legal Change.

First, the *Foreigners* who come proposing or imposing—according to the place—their codes or their laws. Often the borrowing is compulsory: sometimes it is voluntary (this distinction would apply also to other forms of borrowing). This is change from *without*.

Secondly, the *Nationals* themselves come to modify their traditional law. This is “evolution”. The word is peculiarly apposite in relation to Muslim law which is changed by the pronouncements of discreet “modernist” interpreters and commentators. This is change from *within*.

Obviously the two types of change are closely interrelated.

#### 3. The *Methods* of Legal Change.

First, the *Abolition* of the old law without its being replaced by any new law: the abrogation of rules which are supposed to be obsolete.

Secondly, the *Substitution* of a new for an old law, the replacement of a regulation by quite a different regulation relating to the same case.

Thirdly, the *Alteration* of an ancient law which is retained but modified to meet new requirements.

Fourthly, *Innovation* introducing a hitherto unknown law: the regulation of questions which did not arise in earlier conditions (e.g. regulation of railways, highway code, registration of vital statistics, etc.).

(See the examples of these four procedures in No. 11 of the appended Bibliography.)

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<sup>1</sup> Arranged according to date and (with some exceptions) not including the general works quoted in Parts I and II. For the Paris Colonial Libraries see Part I. Let me repeat that this list represents only a selection from a very abundant "literature" on the subject. For the *doctrines* about these problems, see Part II.

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